

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JOANNE ST. LEWIS

Plaintiff

and

DENIS RANCOURT

Defendant

**DEFENDANT’S FACTUM
VOIR DIRE ON “PROXY DEFENCE”**

May 9, 2014
(For use at trial starting May 12, 2014)

Dr. Denis Rancourt
Defendant

Table of Contents

TAB Case law cited:

- 7 *A. Lassonde Inc. v. Sunpac Foods Ltd.*, 1998 CanLII 7983 (FC), at para. 6
- 11 *Angle v. M.N.R.*, 1974 CanLII 168 (SCC), [1975] 2 SCR 248, at p. 254-555
- 6 *Att. Gen. of Can. v. Inuit Tapirisat et al.*, 1980 CanLII 21 (SCC), [1980] 2 SCR 735, at p. 740
- 10 *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (CanLII), [2001] 2 SCR 460, at para. 33
- 3 *Dow Jones Inc. v. Jameel*, [2005] EWCA Civ 75 (C.A.), para. 40
- 1 *Gilles E. Néron Communication Marketing Inc. v. Chambre des notaires du Québec*, 2004 SCC 53 (CanLII), [2004] 3 SCR 95, at para. 54
- 2 *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 SCR 1130, at paras. 91, 100, 141
- 4 *Murphy v. Alexander*, 2004 CanLII 15493 (ON CA), at paras. 29 and 47
- 8 *St. Lewis v. Rancourt*, 2013 ONCA 701 (CanLII), para. 1
- 9 *St. Lewis v. Rancourt*, 2013 ONSC 1564 (CanLII), at para. 92, Smith J.
- 5 *Stocznia Gdanska Sa v. Latreefers Inc.*, [2000] EWCA Civ 36 (C.A.), at para. 61

Canadian Broadcasting Corporation *Appellant*

v.

Gilles E. Néron Communication Marketing Inc. and Gilles E. Néron *Respondents*

and

Chambre des notaires du Québec *Intervener*

INDEXED AS: GILLES E. NÉRON COMMUNICATION MARKETING INC. v. CHAMBRE DES NOTAIRES DU QUÉBEC

Neutral citation: 2004 SCC 53.

File No.: 29519.

2004: February 18; 2004: July 29.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, LeBel and Deschamps JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Civil liability — Defamation — Television network — Public affairs program citing only erroneous portions of letter sent by communications consultant to director of program to request right of reply — Contents of letter presented in incomplete and misleading manner — Whether broadcast legitimate given the public's right to be informed and freedom of expression — Whether broadcast fell short of professional standards of reasonable journalist — Civil Code of Québec, S.Q. 1991, c. 64, art. 1457.

Civil liability — Defamation — Damages — Television network held liable in defamation solidarity with professional order — Damages difficult to divide between parties — Whether trial judge erred in imposing solidary liability — Whether liability in solidum should be ordered.

The French network of the Canadian Broadcasting Corporation ("CBC") aired on the show *Le Point* a report on delays by the Chambre des notaires du Québec

Société Radio-Canada *Appelante*

c.

Gilles E. Néron Communication Marketing inc. et Gilles E. Néron *Intimés*

et

Chambre des notaires du Québec *Intervenante*

RÉPERTORIÉ : GILLES E. NÉRON COMMUNICATION MARKETING INC. c. CHAMBRE DES NOTAIRES DU QUÉBEC

Référence neutre : 2004 CSC 53.

Nº du greffe : 29519.

2004 : 18 février; 2004 : 29 juillet.

Présents : La juge en chef McLachlin et les juges Iacobucci, Major, Bastarache, Binnie, LeBel et Deschamps.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Responsabilité civile — Diffamation — Réseau de télévision — Émission d'affaires publiques ne rapportant que des passages erronés d'une lettre dans laquelle un consultant en communication demande un droit de réplique à la réalisatrice de l'émission — Contenu de la lettre présenté de manière incomplète et trompeuse — Le reportage diffusé était-il légitime compte tenu du droit du public à l'information et de la liberté d'expression? — Le reportage allait-il à l'encontre des normes professionnelles du journaliste raisonnable? — Code civil du Québec, L.Q. 1991, ch. 64, art. 1457.

Responsabilité civile — Diffamation — Dommages-intérêts — Réseau de télévision et ordre professionnel tenus responsables solidairement — Dommages difficiles à répartir entre les parties — Le juge de première instance a-t-il eu tort de conclure à la responsabilité solidaire? — Y a-t-il lieu de conclure à la responsabilité in solidum?

La Société Radio-Canada (« SRC ») diffuse, dans le cadre de son émission *Le Point*, un reportage au sujet des délais de traitement des plaintes disciplinaires portées

TAB 1

(“CNQ”) in dealing with disciplinary complaints against notaries and compensation claims made to its indemnity fund. The CNQ set out to counter the negative effects of the broadcast and the respondent N, who acted as a communications consultant for the CNQ, drafted a handwritten letter to request a meeting with the director of the show. In the letter, he lamented the prejudicial effect that the broadcast had had on the CNQ and pointed out certain errors. When contacted by a journalist of the CBC, N explained that the letter was nothing more than a request for a right of reply and that it was not meant for publication. The journalist pointed out to N two errors in the letter concerning two disgruntled complainants seen in the broadcast. N said that he was going to verify the information, which he had received from the CNQ, and respond within three days. A day before N’s requested time was to expire, *Le Point* broadcast a report crafted as a response to N’s letter, but quoted only the erroneous portions of the letter. Following this broadcast, a rash of letters were received from notaries who expressed indignation and dismay about the CNQ’s communication policies. In a communiqué sent to all notaries and all professional corporations, the Interprofessional Council, the media, the Office des professions and the Minister of Justice, the CNQ asserted that N had sent his letter on his own, without its authorization. Soon thereafter, the CNQ terminated contractual relations with N and his corporation. N lodged a complaint with the CBC’s ombudsman who acknowledged that one of the grievances was well-founded in that the second broadcast seriously compromised the principle of fairness by failing to mention the five grievances that were central to N’s letter and only reporting on the two errors. N and his corporation initiated a claim for damages against the CBC and the CNQ. The Superior Court found the CBC liable in defamation, solidarily with the CNQ. The majority of the Court of Appeal dismissed the CBC’s appeal, concluding that the trial judge had correctly found fault in this case but that the CBC and CNQ were to be held liable *in solidum*, not solidarily. The CNQ is not a party to the appeal before this Court.

Held (Binnie J. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and Iacobucci, Major, Bastarache, LeBel and Deschamps JJ.: Freedom of expression, and its corollary, freedom of the press, play an essential and invaluable role in our society. These fundamental freedoms are protected by s. 3 of the

contre des notaires et des demandes d’indemnisation adressées au Fonds d’indemnisation de la Chambre des notaires du Québec (« CNQ »). La CNQ entreprend de contrer les effets négatifs de ce reportage et l’intimé N, qui remplit la fonction de consultant en communication auprès d’elle, rédige une lettre manuscrite dans laquelle il sollicite un entretien avec la réalisatrice de l’émission. Dans cette lettre, il déplore l’effet préjudiciable que le reportage a eu sur la CNQ et relève certaines inexactitudes. Lorsqu’une journaliste de la SRC communique avec lui, il explique que sa lettre n’est rien de plus qu’une demande de droit de réplique et n’est pas destinée à être publiée. La journaliste fait remarquer à N que la lettre comporte deux inexactitudes au sujet de deux plaignants mécontents que l’on voit dans le reportage. N répond qu’il va vérifier ces informations qu’il tient de la CNQ, et qu’il va lui revenir dans trois jours au plus tard. Un jour avant l’expiration du délai que N a sollicité, l’émission *Le Point* diffuse un reportage qui se veut une réponse à la lettre de N, mais qui ne reprend que les passages erronés de la lettre. À la suite de ce reportage, la CNQ reçoit une multitude de lettres de notaires qui lui expriment leur indignation et leur mécontentement au sujet de ses politiques de communication. Dans un communiqué transmis à tous les notaires et ordres professionnels, au Conseil interprofessionnel, aux médias, à l’Office des professions et au ministre de la Justice, la CNQ affirme que N a envoyé la lettre de sa propre initiative, sans son autorisation. Peu après, la CNQ met fin à ses rapports contractuels avec N et sa société. N dépose une plainte auprès de l’ombudsman de la SRC qui reconnaît le bien-fondé de l’un des griefs, en ce sens que le reportage a sérieusement péché contre le principe de l’équité en omettant de faire état des cinq griefs qui constituaient l’essentiel de la lettre de N pour ne retenir que les deux inexactitudes. N et sa société intentent une action en dommages-intérêts contre la SRC et la CNQ. La Cour supérieure tient la SRC et la CNQ responsables solidairement à l’égard de propos diffamatoires. La Cour d’appel à la majorité rejette l’appel de la SRC et décide que le juge de première instance a eu raison de conclure à l’existence d’une faute en l’espèce, mais que la SRC et la CNQ doivent être tenues responsables *in solidum* et non solidairement. La CNQ n’est pas partie au pourvoi devant notre Cour.

Arrêt (le juge Binnie est dissident) : Le pourvoi est rejeté.

La juge en chef McLachlin et les juges Iacobucci, Major, Bastarache, LeBel et Deschamps : La liberté d’expression et son corollaire, la liberté de presse, jouent un rôle essentiel et inestimable dans notre société. Ces libertés fondamentales sont garanties par

Quebec *Charter of Human Rights and Freedoms* and s. 2(b) of the *Canadian Charter of Rights and Freedoms*. However, freedom of expression is not absolute and can be limited by the requirements imposed by other people's right to the protection of their reputation. This right also receives protection under s. 4 of the *Quebec Charter* and under art. 3 C.C.Q. In an action in defamation, the two fundamental values of freedom of expression and the right to reputation must be weighed against each other to find the necessary equilibrium.

An action in defamation in Quebec is grounded in art. 1457 C.C.Q. Like any other action in civil, delictual and quasi-delictual liability, the plaintiff must establish, on a balance of probabilities, the existence of injury, a wrongful act and a causal connection between the two. Furthermore, in order to prove injury, the plaintiff must demonstrate that the impugned remarks were defamatory. Here, the thrust of the CBC's argument is the absence of fault. The other elements are not seriously at issue. The determination of fault in an action in defamation involves a contextual analysis of the facts and circumstances. Truth and public interest are factors to consider but they are not necessarily the determinative factors. It is insufficient in this case to focus merely on the veracity of the content of the second broadcast report. One must look globally at the tenor of the broadcast, the way it was conducted and the context surrounding it. The guiding principle of liability for defamation is that there will not be fault until it has been shown that the journalist or media outlet in question has fallen below professional standards. The conduct of the reasonable journalist becomes the all-important guidepost.

In holding the CBC liable for defamation, the Superior Court and the Court of Appeal achieved the correct balance between freedom of expression and N's right to respect for his reputation. Even though N's handwritten letter cannot be considered private, in focussing only on the two errors in that letter, the second broadcast was misleading, giving the impression that the substance of N's letter was limited to these two erroneous statements. The letter discussed other concerns relating to the image of notaries created by the broadcast. A person viewing the report in question would not be aware of these other concerns. Nor would the viewer be aware, from the structure of the report, that the letter was really just a request for a meeting and a right of reply. By leaving out vital pieces of information the CBC misrepresented N's letter as a disingenuous attempt to mislead the CBC, and thereby

l'art. 3 de la *Charte des droits et libertés de la personne* du Québec et par l'al. 2b) de la *Charte canadienne des droits et libertés*. Cependant, la liberté d'expression n'est pas absolue et elle peut être limitée par les exigences du droit d'autrui à la protection de sa réputation. Ce droit est également protégé par l'art. 4 de la *Charte québécoise* et l'art. 3 C.c.Q. Pour établir l'équilibre nécessaire dans le cadre d'une action pour diffamation, il faut soupeser, l'une en fonction de l'autre, les deux valeurs fondamentales que sont la liberté d'expression et le droit à la sauvegarde de la réputation.

Au Québec, l'action pour diffamation repose sur l'art. 1457 C.c.Q. Comme pour toute autre action en responsabilité civile, délictuelle ou quasi délictuelle, le demandeur doit établir, selon la prépondérance des probabilités, l'existence d'un préjudice, d'une faute et d'un lien de causalité entre les deux. En outre, pour faire la preuve d'un préjudice, le demandeur doit démontrer que les propos litigieux sont diffamatoires. En l'espèce, la SRC invoque essentiellement l'absence de faute. Les autres éléments ne sont pas vraiment en cause. Dans une action pour diffamation, il faut procéder à une analyse contextuelle des faits et des circonstances pour déterminer si une faute a été commise. La véracité et l'intérêt public sont des facteurs dont il faut tenir compte, mais ils ne jouent pas nécessairement le rôle d'un facteur déterminant. Il ne suffit pas, en l'espèce, de mettre l'accent sur la véracité du contenu du deuxième reportage. Il faut examiner globalement la teneur du reportage, sa méthodologie et son contexte. Selon le principe directeur applicable en matière de responsabilité pour diffamation, le journaliste ou le média en question n'aura commis une faute que s'il est démontré qu'il n'a pas respecté les normes professionnelles. La conduite du journaliste raisonnable devient une balise de la plus haute importance.

En tenant la SRC responsable de diffamation, la Cour supérieure et la Cour d'appel ont atteint un juste équilibre entre la liberté d'expression et le droit de N à la sauvegarde de sa réputation. Même si la lettre manuscrite de N ne peut pas être qualifiée de privée, en ne mettant l'accent que sur les deux inexactitudes contenues dans cette lettre, le deuxième reportage était trompeur du fait qu'il donnait l'impression que le contenu de la lettre de N se limitait à ces deux affirmations inexacts. La lettre faisait état d'autres préoccupations relatives à l'image des notaires véhiculée par le reportage. La personne qui visionnait le reportage en question ne pouvait pas se rendre compte de ces autres préoccupations. De par sa présentation, le reportage ne permettait pas non plus au téléspectateur de s'apercevoir que la lettre n'était en réalité qu'une demande de rencontre et de droit de réplique. En omettant certains

the public. Moreover, the CBC intentionally and deliberately broadcast the errors in the letter before N could attempt to set things straight. The tone and tilt of the second broadcast pointed to its being more of a response to N's criticism than an exercise in protecting the public interest. Lastly, the CBC's own ombudsman found one of N's complaints to be quite serious and considered the second broadcast to have the appearance of a settling of accounts. This is highly detrimental to the CBC's case. The Ombudsman also openly implied that the journalists did not live up to proper journalistic standards, given the selective use of certain portions of the letter. These factors lead to the conclusion that the CBC intentionally defamed N and did so in a manner that fell below the professional standards of a reasonable journalist. By not respecting professional standards in this case, and given all the other surrounding circumstances, the CBC was at fault.

An order for liability *in solidum* is appropriate. The damages were of a global nature and it would be difficult, in practical terms, to divide the object of the global debt. Moreover, the trial judge is to be afforded significant deference in respect of his finding that the damages could not be easily divided. There has been little evidence adduced to explain how the damages could be apportioned between the CBC and CNQ in a just fashion. As such, this is the kind of case where the liability of the parties should be *in solidum*.

Per Binnie J. (dissenting): A legal rule that awards \$673,153 in damages to N and his corporation on the basis of a broadcast which stated true facts, the publication of which was undoubtedly in the public interest, just because other lesser matters might also have been mentioned but were not, or further context might have been provided but was not, is inconsistent with s. 3 of the Quebec *Charter of Human Rights and Freedoms* including the public's right to have access to true and accurate information about matters of legitimate interest and concern. In this case, despite the journalists' boorish refusal to meet promptly with N and the poor quality of presentation evident in the second broadcast, civil fault should not be attributed to the CBC when all the relevant public interest issues are taken into account.

renseignements indispensables, la SRC a faussement présenté la lettre de N comme une tentative fallacieuse de l'induire en erreur et, du même coup, d'induire le public en erreur. De plus, la SRC a intentionnellement et délibérément diffusé les inexactitudes contenues dans la lettre avant même que N ait eu la chance de rétablir les faits. D'après son ton et son allure, le deuxième reportage ressemblait davantage à une réaction à la critique de N qu'à un exercice de protection de l'intérêt public. Enfin, l'ombudsman de la SRC a lui-même conclu que l'une des plaintes de N était très sérieuse et a estimé que le reportage avait des allures de règlement de compte. Cela affaiblit considérablement la thèse de la SRC. L'ombudsman a aussi laissé entendre ouvertement que les journalistes n'avaient pas respecté les normes journalistiques applicables en choisissant de n'utiliser que certaines parties de la lettre. Ces facteurs incitent à conclure que la SRC a intentionnellement difamé N, et ce, d'une manière non conforme aux normes professionnelles du journaliste raisonnable. Compte tenu de son manquement aux normes professionnelles en l'espèce et de toutes les autres circonstances de l'affaire, la SRC a commis une faute.

Une déclaration de responsabilité *in solidum* est appropriée. Les dommages étaient de nature globale et il serait difficile, en pratique, de diviser l'objet d'une telle créance globale. De surcroît, il faut traiter avec beaucoup de déférence la conclusion du juge de première instance selon laquelle il n'était pas facile de répartir les dommages entre les défendeurs. On a présenté très peu d'éléments de preuve au sujet de la façon de procéder à une répartition juste des dommages entre la SRC et la CNQ. Par conséquent, cette affaire présente une situation où la responsabilité des parties doit être *in solidum*.

Le juge Binnie (dissident) : Une règle de droit qui, à la suite d'un reportage ayant exposé des faits véridiques dont la publication était indéniablement d'intérêt public, accorde 673 153 \$ de dommages-intérêts à N et à sa société seulement parce que d'autres détails moins importants auraient dû être mentionnés mais ne l'ont pas été, ou que d'autres faits auraient dû être exposés mais ne l'ont pas été, n'est pas conforme à l'art. 3 de la *Charte des droits et libertés de la personne* du Québec, notamment au droit de la population à une information véridique et exacte concernant des questions d'intérêt légitime pour elle. En l'espèce, en dépit du refus impoli des journalistes de rencontrer promptement N et de la présentation boiteuse du deuxième reportage, il n'y a pas lieu d'imputer à la SRC une faute civile compte tenu de toutes les questions d'intérêt public pertinentes.

The first broadcast relied in part on two complainants, T and L, who agreed to be interviewed on the air. On learning about the broadcast, the CNQ (without checking its facts) leapt to the attack, alleging (erroneously) that L had lied about his complaint because the CNQ had in fact reimbursed him for a loss suffered at the hands of one of its members, and that T's brother was the leader of a bizarre and violent cult. It was appropriate to bring these allegations to the attention of viewers, together with the journalists' response.

First, while the second broadcast ought to have presented N's letter in a more complete and balanced fashion, the lack of balance did not subvert the truth of the real matter of interest to the public, namely the truth of the CNQ's allegations pertaining to the complainants. Second, although N ought to have been given time to verify the errors in the letter, the allegations against the complainants were demonstrably false whether or not N took the opportunity to verify them. Had N publicly acknowledged the falsity of the allegations, it would simply have added to the impression that the CNQ had responded impetuously to the original broadcast with a misinformed attack on the complainants, for which it should justly be called to account. Furthermore, it would not have improved N's reputation for the CBC to report that he wanted time to find out about the truth of the CNQ's allegations only after they were made. Third, the CBC was entitled to consider the information it had received to be public. There was no indication in N's letter to the contrary. Fourth, the criticism of some aspects of the second broadcast by the CBC's ombudsman cannot be equated with a finding of civil fault. He was not concerned with balancing the values of a free press and the respect for reputation. Had the other points made in N's letter been broadcast they would not have pulled the sting, or served the public interest in any substantial way, or for that matter, have helped to save N's reputation.

Cases Cited

By LeBel J.

Applied: *Société Radio-Canada v. Radio Sept-Îles Inc.*, [1994] R.J.Q. 1811; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *Prévost-Masson v. General Trust of Canada*, [2001] 3 S.C.R. 882, 2001 SCC 87; *Prud'homme v. Prud'homme*, [2002] 4 S.C.R. 663, 2002 SCC 85; **referred to:** *Whiten v.*

Le premier reportage présentait notamment deux plaignants qui avaient accepté d'être interviewés, à savoir T et L. Après avoir pris connaissance du reportage, la CNQ (sans s'être donné la peine de vérifier les faits rapportés) est passée directement à l'attaque en alléguant (à tort) que L avait menti au sujet de sa plainte — étant donné qu'elle lui avait, en réalité, remboursé la perte causée par l'un de ses membres — et que le frère de T était à la tête d'une secte étrange et violente. Il convenait d'attirer l'attention des téléspectateurs sur ces allégations et sur la réponse des journalistes.

Premièrement, malgré le fait que le deuxième reportage aurait dû présenter la lettre de N d'une manière plus complète et équilibrée, son caractère boiteux n'a rien changé à la véracité de la vraie question d'intérêt public, à savoir la véracité des allégations de la CNQ concernant les plaignants. Deuxièmement, même si N avait dû avoir le temps nécessaire pour vérifier l'exactitude de ses propos, les allégations dont étaient l'objet les plaignants étaient manifestement fausses peu importe que N les ait vérifiées ou non. Si N avait publiquement reconnu la fausseté de ces allégations, cela aurait simplement eu pour effet d'accroître l'impression que la CNQ avait riposté de manière impétueuse au premier reportage en soumettant les plaignants à des attaques comportant des inexactitudes, dont elle doit à juste titre être appelée à rendre compte. En outre, il n'aurait pas été mieux pour la réputation de N de rapporter qu'il avait sollicité un délai pour vérifier l'exactitude des allégations de la CNQ seulement après qu'elles eurent été formulées. Troisièmement, la SRC pouvait considérer publique l'information qu'elle avait reçue. Rien n'indiquait le contraire dans la lettre de N. Quatrièmement, la critique de certains aspects du deuxième reportage à laquelle s'est livré l'ombudsman de la SRC ne saurait être assimilée à une conclusion de faute civile. Il ne s'est pas soucié de mettre en balance les valeurs de la liberté de presse et la sauvegarde de la réputation. Si elles avaient été diffusées, les autres remarques contenues dans la lettre de N n'auraient ni remédié au tort causé ni été essentiellement d'intérêt public ou, du reste, utiles pour sauvegarder la réputation de N.

Jurisprudence

Citée par le juge LeBel

Arrêts appliqués : *Société Radio-Canada c. Radio Sept-Îles Inc.*, [1994] R.J.Q. 1811; *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130; *Prévost-Masson c. Trust Général du Canada*, [2001] 3 R.C.S. 882, 2001 CSC 87; *Prud'homme c. Prud'homme*, [2002] 4 R.C.S. 663, 2002 CSC 85; **arrêts mentionnés :** *Whiten*

Pilot Insurance Co., [2002] 1 S.C.R. 595, 2002 SCC 18; *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421; *Viel v. Entreprises immobilières du terroir ltée*, [2002] R.J.Q. 1262; *Aubry v. Éditions Vice-Versa inc.*, [1998] 1 S.C.R. 591; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33.

By Binnie J. (dissenting)

Snyder v. Montreal Gazette Ltd., [1988] 1 S.C.R. 494; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459; *Société Radio-Canada v. Radio Sept-Îles Inc.*, [1994] R.J.Q. 1811; *Prud'homme v. Prud'homme*, [2002] 4 S.C.R. 663, 2002 SCC 85.

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Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 3, 4, 5.
Civil Code of Québec, S.Q. 1991, c. 64, preliminary provision, arts. 3, 35, 36, 1457, 1478, 1525, 1619, 2125.
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Sylvie Gadoury and Judith Harvie, for the appellant.

Jacques Jeansonne and Alberto Martinez, for the respondents.

Michel Jetté, for the intervenor.

c. Pilot Insurance Co., [2002] 1 R.C.S. 595, 2002 CSC 18; *Société Radio-Canada c. Lessard*, [1991] 3 R.C.S. 421; *Viel c. Entreprises immobilières du terroir ltée*, [2002] R.J.Q. 1262; *Aubry c. Éditions Vice-Versa inc.*, [1998] 1 R.C.S. 591; *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1991] 3 R.C.S. 459; *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33.

Citée par le juge Binnie (dissident)

Snyder c. Montreal Gazette Ltd., [1988] 1 R.C.S. 494; *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1991] 3 R.C.S. 459; *Société Radio-Canada c. Radio Sept-Îles Inc.*, [1994] R.J.Q. 1811; *Prud'homme c. Prud'homme*, [2002] 4 R.C.S. 663, 2002 CSC 85.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 2b).
Charte des droits et libertés de la personne, L.R.Q., ch. C-12, art. 3, 4, 5.
Code civil du Québec, L.Q. 1991, ch. 64, disposition préliminaire, art. 3, 35, 36, 1457, 1478, 1525, 1619, 2125.
Code de procédure civile, L.R.Q., ch. C-25, art. 547.

Doctrine citée

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POURVOI contre un arrêt de la Cour d'appel du Québec, [2002] R.J.Q. 2639 (*sub nom. Société Radio-Canada c. Gilles E. Néron Communication Marketing Inc.*), [2002] J.Q. n° 4727 (QL), infirmant en partie une décision de la Cour supérieure, [2000] R.J.Q. 1787, [2000] J.Q. n° 2011 (QL). Pourvoi rejeté, le juge Binnie est dissident.

Sylvie Gadoury et Judith Harvie, pour l'appelante.

Jacques Jeansonne et Alberto Martinez, pour les intimés.

Michel Jetté, pour l'intervenante.

The judgment of McLachlin C.J. and Iacobucci, Major, Bastarache, LeBel and Deschamps JJ. was delivered by

LEBEL J. —

I. Introduction

This is an appeal from a majority judgment of the Quebec Court of Appeal dismissing the appeal of the Canadian Broadcasting Corporation (“CBC”) from the decision of Tellier J. at trial. Tellier J. found the CBC liable in defamation, solidarily with the Chambre des notaires du Québec (“CNQ”), for damages stemming from a program aired on January 12, 1995 on the CBC’s French language television network. The CNQ is not a party to this appeal. I dismiss the CBC’s appeal for the reasons that follow.

II. Background

In the months preceding January 12, 1995 (the date of the relevant broadcast), it appears that the CNQ was having difficulty managing certain disciplinary complaints and claims for compensation brought by the public. At the same time, starting in September 1994, the broadcasting team of the CBC’s *Le Point* news program undertook to produce a series of programs aimed at examining whether Quebec professional orders like the CNQ adequately protect the interests of the public. On December 15, 1994, the CBC aired a report on delays at the CNQ in dealing with disciplinary complaints against notaries and compensation claims made to the CNQ’s Indemnity Fund. A journalist from *Le Point* named Ms. Johanne Faucher interviewed two particularly disgruntled complainants, Mr. Yvon Thériault and Mr. Richard Lacroix.

It was at this point that the respondent Gilles E. Néron came into the picture. Mr. Néron is the founder of the respondent company Gilles E. Néron Communication Marketing Inc. (“GEN Communication”). Through his company, he acted as a communications consultant for public institutions, including the CNQ. On December 16, 1994, the CNQ set out immediately to counter the negative

Version française du jugement de la juge en chef McLachlin et des juges Iacobucci, Major, Bastarache, LeBel et Deschamps rendu par

LE JUGE LeBEL —

I. Introduction

Le présent pourvoi est formé contre un arrêt majoritaire dans lequel la Cour d’appel du Québec a rejeté l’appel de la Société Radio-Canada (« SRC ») contre la décision rendue en première instance par le juge Tellier. Le juge Tellier a reconnu l’appelante responsable, solidairement avec la Chambre des notaires du Québec (« CNQ »), des dommages résultant des propos diffamatoires tenus dans le cadre d’un reportage diffusé le 12 janvier 1995. La CNQ n’est pas partie au pourvoi. Je rejette le pourvoi de la SRC pour les motifs qui suivent.

II. Les faits

Au cours des mois ayant précédé le 12 janvier 1995 (date de diffusion du reportage en cause), il semble que la CNQ ait eu de la difficulté à gérer certaines plaintes disciplinaires et demandes d’indemnisation émanant du public. À la même époque, soit en septembre 1994, l’équipe de l’émission de télévision *Le Point* de la SRC amorce la production d’une série de reportages visant à déterminer si les ordres professionnels, telle la Chambre des notaires du Québec, protègent adéquatement les intérêts du public. Le 15 décembre 1994, la SRC diffuse un reportage au sujet des délais de traitement des plaintes disciplinaires portées contre des notaires et des demandes d’indemnisation adressées au Fonds d’indemnisation de la CNQ. Madame Johanne Faucher, journaliste de l’émission *Le Point*, interviewe deux plaignants particulièrement mécontents, MM. Yvon Thériault et Richard Lacroix.

L’intimé, M. Gilles E. Néron, entre alors en scène. Monsieur Néron est le fondateur de la société intimée, Gilles E. Néron Communication Marketing inc. (« GEN Communication »). Par l’entremise de sa société, il remplit la fonction de consultant en communication auprès d’institutions publiques, dont la CNQ. Le 16 décembre 1994, la CNQ entreprend immédiatement de contrer les effets négatifs

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effects of the CBC broadcast. It was in this context that Mr. Néron drafted the following handwritten letter, on December 18, 1994, to request a meeting with Ms. Kateri Lescop, director of *Le Point*. In it, he lamented the prejudicial effect that the December 15th broadcast had on the CNQ, and points out certain errors. At this point, it would be useful to quote the handwritten letter in full:

[TRANSLATION]

Kateri Lescop
Director
Le Point — CBC

Dear Ms. Lescop:

We met at the opening of the CNQ convention in Quebec City. I also helped make it possible for the CNQ, its president, Louise Bélanger, and its syndic, Mr. Mercier, to provide you with assistance in preparing your report on professional corporations. I work with the CNQ as an adviser.

I therefore watched last Thursday's report on Le Point with interest.

I was unable to reach you Friday and would like to meet with you as soon as possible.

I invite you to read the news release and letter that I forwarded to Claude Langlois at the Journal de Montréal.

Personally, I found your report to be accurate for the most part. You referred to two cases, most regrettable ones at that, and gave two CNQ representatives the opportunity to comment.

However, I must take issue with the following:

- 1- The introduction, which was run repeatedly (the night before on Le Point, on the 10 o'clock news, that morning in the Journal de Montréal and again at the beginning of the report), led viewers to believe that notaries are not to be trusted and that the CNQ does not protect the public well.
- 2- Your conclusion that "Mr. Lacroix is considering writing to the Minister to ask him to put the CNQ under trusteeship" gave some people the impression that the chairman of the Office [des

du reportage diffusé par la SRC. C'est dans ce contexte que, le 18 décembre 1994, M. Néron rédige la lettre manuscrite suivante, dans laquelle il sollicite un entretien avec M^{me} Kateri Lescop, réalisatrice de l'émission *Le Point*. Dans sa lettre, il déplore l'effet préjudiciable que le reportage du 15 décembre a eu sur la CNQ et relève certaines inexactitudes. Il est ici utile de reproduire intégralement la lettre manuscrite :

M^{me} Kateri Lescop
Réalisatrice
Le Point — SRC

Madame,

Nous nous sommes rencontrés à l'ouverture du Congrès de la CNQ à Québec. J'ai aussi contribué à ce que la Chambre des notaires, sa présidente M^e Louise Bélanger et le syndic M^e Mercier vous facilitent la tâche dans la préparation de votre reportage sur les corporations professionnelles. Je collabore avec la Chambre à titre de conseiller.

Aussi, ai-je regardé avec intérêt le reportage au Point de jeudi dernier.

J'ai tenté sans succès de vous rejoindre vendredi, aussi je sollicite une rencontre avec vous dans les meilleurs délais.

Je vous invite à faire lecture du communiqué de presse et de la lettre que j'ai fait parvenir à M. Claude Langlois du Journal de Montréal.

Personnellement, je trouve qu'en grande partie, le reportage que vous avez préparé est correct. Vous faites référence à 2 cas, fort regrettables d'ailleurs et vous laissez aux deux représentants de la CNQ le temps pour s'exprimer.

Mais voilà où j'accroche :

- 1- L'introduction présentée de façon répétitive (la veille au Point; aux nouvelles de 22 hres; le matin dans le Journal de Mtl et encore en début de reportage) prépare les auditeurs à comprendre que l'on ne peut faire confiance aux notaires et que la CNQ protège mal le public.
- 2- Votre conclusion « M. Lacroix songe à écrire au ministre pour lui demander de placer la CNQ en tutelle » a donné l'impression à certains que c'est le président de l'Office [des professions] qui

professions] was going to make this request, while others were left thinking that Le Point's reporters came to this conclusion after their investigation.

- 3- In the report, the death threats made against the president are referred to as nonsense. Mr. Thériault is presented as a person who would be justified in making such threats. You failed to mention that he is the brother of the Thériault who was the Pope of the Infinite Love cult and who cut off his spouse's arm.
- 4- You also failed to mention in the report that Mr. Lacroix was reimbursed by the CNQ for the money he lost.
- 5- I also have difficulty understanding the reference to notary Potiron, the fusty old man. I found this allusion inappropriate. The notarial profession has a 128-year history of faithful service in Quebec. There are many young notaries. They are excellent, dynamic and innovative legal professionals.

In recent years, more than 70% of all newly admitted notaries have been women.

All notaries, women and men, have been affected by your report. When you work hard and conscientiously for your clients, it is difficult to hear someone call you a thief and irresponsible.

There are people in any profession or situation who will take advantage of others, but the supervision and monitoring system established by the CNQ works. As Ms. Bélanger and Mr. Mercier explained to you, the notarial profession is, by its very nature and by the training required, a very demanding one, and this ensures a very high degree of integrity. However, if in an exceptional case a notary takes a chance, he or she will always be caught very quickly.

It is the subsequent process relating to justice and human rights that takes time.

Today, some notaries are rebuking the president for co-operating with you, but she did so in good faith, and also because it is her responsibility. When things like this take place, rationality does not always prevail.

Le Point is an important program that influences many people. There are things that must be put in perspective, and I would like to discuss them with you and Mr. Lépine if you see fit to do so.

allait le demander et à d'autres que les reporter [*sic*] du Point arrivaient à cette conclusion après leur enquête.

- 3- Dans le reportage on fait référence aux menaces de mort à l'endroit de la présidence comme une baliverne. On présente M. Thériault comme une personne qui a bien raison de faire ces menaces. Vous n'avez pas fait référence au fait qu'il est le frère de ce Thériault, le Pape de la secte de l'Amour infini qui avait coupé le bras de sa conjointe.
- 4- Dans le reportage, vous ne dites pas, non plus, que M. Lacroix avait été remboursé par la CNQ pour les sommes qu'il avait perdues.
- 5- Je ne comprends pas, non plus, la référence au notaire Potiron, le poussiéreux. J'ai trouvé l'allusion déplacée. Le notariat au Québec a 128 ans d'histoire en loyaux services. Il y a beaucoup de jeunes notaires. Ils sont d'excellents juristes, dynamiques et avangardistes [*sic*].

Dans les rescentes [*sic*] années, ce sont des femmes à plus de 70 % qui composent les nouvelles promotions.

Aujourd'hui, elles et ils sont tous affectés par votre reportage. Lorsque vous travaillez dure [*sic*] et de façon consciencieuse pour votre clientèle vous vivez mal que l'on vous traite de voleur et d'irresponsable.

Il y a des profiteurs dans toutes les professions et dans tous les milieux. Mais le système de contrôle et de surveillance établi par la CNQ fonctionne. Comme vous l'ont expliqué M^e Bélanger et M^e Mercier la formation des notaires et la nature même de la profession sont très exigeantes et assurent un très haut degré d'intégrité. Mais si une exception prend une chance, il se fait toujours prendre et ce, très rapidement.

C'est le processus rattaché à la justice et aux droits de la personne qui prend du temps par la suite.

Aujourd'hui, il y a des notaires qui blâment la présidente d'avoir collaboré avec vous. Pourtant, elle l'a fait de bonne foi et parce que c'est aussi sa responsabilité. Dans des événements comme ceux-là, ce n'est pas toujours le rationnel qui prime.

Le Point est une émission importante qui influence bien des gens. Il y a des choses à remettre en perspective et j'aimerais en discuter avec vous et avec M. Lépine, si vous le jugez à propos.

The president, Ms. Bélanger, also hopes to have an opportunity very soon to make a comment in an upcoming broadcast of Le Point.

Ms. Lescop, for over 20 years my name has, by choice, been linked with ethics. I can attest that the last things notaries can, as a group, be accused of are failings at the level of rigour or of ethics.

I look forward to meeting with you in the next few days.

Yours sincerely,
(Signed) Gilles E. Néron,
President

(Underlining in original.)

4

Mr. Néron personally delivered this letter to the CBC's offices. The following day, Monday, December 19th, a change of strategy occurred at the CNQ. A decision was made internally no longer to seek a right of reply. However, Mr. Néron's letter was already in the CBC's hands. Mr. Néron continued to attempt to contact Ms. Lescop between December 22, 1994 and January 6, 1995, leaving a few telephone messages for her. Although the CNQ had decided that it would no longer seek a right of reply, Mr. Néron still had a mandate from the CNQ to meet with Ms. Lescop and attempt to repair the negative image of notaries resulting from the December 15th broadcast. Ms. Lescop did not return any of Mr. Néron's calls. On January 4th, however, the journalist Ms. Johanne Faucher contacted the CNQ's internal communications adviser (Mr. Antonin Fortin) at the CNQ. In keeping with the CNQ's decision, Mr. Fortin refused Ms. Faucher's offer of a follow-up interview. Ms. Faucher questioned the internal communications adviser about the content of Mr. Néron's letter to Ms. Lescop, to which he replied that the letter was a personal initiative of Mr. Néron's.

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In the afternoon of January 10, 1995, Ms. Faucher contacted Mr. Néron, who reiterated that the CNQ no longer sought a right of reply. He added that the December 18, 1994 letter was nothing more than a request for a right of reply. The letter was addressed to Ms. Lescop personally and was not meant for publication [TRANSLATION] "or to be communicated

La présidente, M^c Bélanger souhaite aussi avoir l'occasion de faire un commentaire à une très prochaine émission du Point.

M^{me} Lescop, depuis plus de 20 ans l'éthique est associée à mon nom, par choix. Je puis témoigner que les dernières choses que l'on pourrait reprocher à l'ensemble des notaires seraient leur manque de rigueur et leur manque d'éthique.

Espérant qu'il nous sera possible de se rencontrer au cours des prochains jours, je vous prie d'agréer l'expression de mes sentiments les meilleurs.

(Signé) Gilles E. Néron
président

(Souligné dans l'original.)

Monsieur Néron porte lui-même cette lettre aux bureaux de la SRC. Le lendemain, soit le lundi 19 décembre, la CNQ change de stratégie. Elle décide, de son propre chef, de renoncer à tout droit de réplique. Toutefois, la SRC a déjà en sa possession la lettre de M. Néron. Entre le 22 décembre 1994 et le 6 janvier 1995, M. Néron tente de nouveau de communiquer avec M^{me} Lescop, lui laissant quelques messages téléphoniques. Malgré la décision de la CNQ de renoncer à tout droit de réplique, M. Néron est toujours autorisé à rencontrer M^{me} Lescop et à essayer de corriger l'image négative des notaires véhiculée par le reportage du 15 décembre. Madame Lescop ne rappelle pas M. Néron. Le 4 janvier, la journaliste M^{me} Faucher communique avec le conseiller interne en communication de la CNQ, M. Antonin Fortin. Conformément à la décision de la CNQ, M. Fortin rejette l'offre d'interview complémentaire faite par M^{me} Faucher. Aux questions de M^{me} Faucher portant sur le contenu de la lettre adressée par M. Néron à M^{me} Lescop, il répond que la lettre est une démarche personnelle de M. Néron.

Au cours de l'après-midi du 10 janvier 1995, M^{me} Faucher communique avec M. Néron, qui réitère que la CNQ renonce à tout droit de réplique. Il précise, en outre, que sa lettre du 18 décembre 1994 n'est rien de plus qu'une demande de droit de réplique. Cette lettre est adressée à M^{me} Lescop personnellement et n'est pas destinée à être publiée « ni [à]

in any form whatsoever”. Ms. Faucher pointed out two errors in the letter. She informed Mr. Néron that Mr. Thériault was not the brother of the infamous Roch Thériault (alias Moses) and that Mr. Lacroix had not yet been compensated by the CNQ. Mr. Néron’s response was that he was going to verify this information, which he had received from the CNQ, and that he would “get back to her no later than the upcoming Friday[, January 13, 1995] at the end of the day”.

Late in the afternoon of Thursday, January 12, 1995, Mr. Néron learned that the letter was the subject of a report to be aired that same night. This was a day before Mr. Néron’s requested time was to expire.

The report that night was crafted as a response to Mr. Néron’s letter of December 18th. First, significant portions of the December 15th broadcast were reproduced, in particular those parts relating to Mr. Thériault and Mr. Lacroix. The journalist then quoted the erroneous portions of the letter relating to Mr. Thériault and Mr. Lacroix. Since the content of the January 12th report is so relevant to the outcome of this appeal, I shall reproduce the same extracts that the trial judge chose to quote at pp. 1797-98 of his reasons. The segment was entitled *Mise au Point*:

[TRANSLATION]

Achille Michaud

The CNQ was shocked and shaken by the report. It even refused to comment on it.

However, one of its communications advisers wrote to us, accusing us of having made several errors.

Tonight, we will respond to this criticism.

. . .

Johanne Faucher

The testimony of two individuals who have filed complaints with the CNQ revealed the following:

- *the CNQ is slow to take action against notaries who are guilty of fraud;*
- *their investigations are unduly long; and*

être communiquée sous quelque forme que ce soit ». Madame Faucher relève deux inexactitudes dans la lettre. Elle informe M. Néron que M. Thériault n’est pas le frère de l’infâme Roch Thériault (alias Moïse) et que M. Lacroix n’a pas encore été indemnisé par la CNQ. Monsieur Néron réplique qu’il va vérifier ces informations qu’il tient de la CNQ et qu’il « va lui revenir au plus tard en fin de journée [le] vendredi » 13 janvier 1995.

Le jeudi 12 janvier 1995, en fin d’après-midi, M. Néron apprend que sa lettre va faire l’objet d’un reportage le soir même, c’est-à-dire un jour avant l’expiration du délai qu’il a sollicité.

Le reportage diffusé ce soir-là se veut une réponse à la lettre du 18 décembre de M. Néron. On commence par présenter de larges extraits du reportage du 15 décembre, en particulier ceux concernant MM. Thériault et Lacroix. La journaliste cite ensuite les passages de la lettre qui contiennent des inexactitudes au sujet de MM. Thériault et Lacroix. Étant donné la grande pertinence du contenu du reportage du 12 janvier pour les besoins du présent pourvoi, je reproduis les mêmes extraits que le juge de première instance a choisi de citer aux p. 1797-1798 de ses motifs. Le segment s’intitule *Mise au Point* :

Achille Michaud

La CNQ a été choquée et ébranlée par ce document. Elle a même refusé de le commenter.

Mais l’un de ses conseillers en communication nous a écrit pour nous reprocher des erreurs que nous aurions commises.

Nous répondons ce soir à cette critique.

. . .

Johanne Faucher

Les témoignages de 2 personnes qui ont porté plainte à la CNQ ont montré que :

- *la CNQ tarde à intervenir contre les notaires fraudeurs*
- *que les enquêtes s’étirent indûment*

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– these *delays cause serious harm* to the victims of fraud.

. . .

Johanne Faucher

The CNQ's slowness to take action left him so distraught *that he eventually made threats against its president.*

A bodyguard keeps watch at the entrance to the CNQ's offices. *The president has received death threats.*

Yvon Thériault

I scared them, but I told them. I don't mind spending the rest of my life in jail, and it's not certain that I won't be spending time in prison.

I'm going to break windows. I'm going to make noise. I'm going to raise a ruckus. I'm not going to leave them alone, in other words. I'm not a murderer; I won't kill anyone. I told them I wouldn't kill anybody. *They were the ones who thought I wanted to kill somebody. I basically let them think that.* But I would have broken things. I would have made noise, that's for sure. I would have raised hell to get my case to the top of the pile, because they told me that the president had just gotten back from vacation and that she had 200 cases.

. . .

Johanne Faucher

The CNQ didn't like our report one bit; it, *and in particular its communications adviser, Gilles E. Néron*, accuses us of having tarnished the reputation of all of Quebec's notaries. *In his criticism of our report, Mr. Néron made a number of erroneous statements, and we would like to set the record straight.*

Mr. Thériault is presented as a person who would be justified in making such threats. You failed to mention that he is the brother of the Thériault who was the Pope of the Infinite Love cult and who cut off his spouse's arm. [Excerpt from Mr. Néron's letter]

Mr. Thériault, are you the brother of Rock Thériault, *also known as Moses?*

Yvon Thériault

Absolutely not.

I'm not his brother and I'm not a relative of his either, not a close or distant relative. If you need proof, here's

– et que ces *délais causent un préjudice sérieux* aux victimes de fraude.

. . .

Johanne Faucher

Les lenteurs de la CNQ l'ont mis à bout de nerf *si bien qu'il a fini par faire des menaces à la présidente.*

Un garde du corps surveille l'entrée de la CNQ. *La présidente a reçu des menaces de mort.*

Yvon Thériault

Je leur ai fait peur mais je leur disais. Ça ne me dérange pas de passer le restant de ma vie en prison et c'est pas dit que je ne passerai pas du temps en prison.

Je vais défoncer des vitrines. Je vais faire du bruit. Je vais faire du tapage. Je ne les laisserai pas tranquilles en d'autres mots. Je ne suis pas un tueur, je ne tuerai pas. Je leur ai dit que je ne tuerais pas. *Eux-autres [sic] pensaient que j'allais tuer. Dans le fond, je les ai laissés [sic] penser ça.* Mais j'aurais cassé. J'aurais fait du bruit certain. J'aurais fait du grabuge pour remettre mon dossier sur le dessus parce qu'on venait de me dire que même la présidente arrivait de vacances et qu'elle avait 200 dossiers.

. . .

Johanne Faucher

La CNQ n'a pas du tout apprécié notre reportage et nous accuse d'avoir terni la réputation de tous les notaires du Québec *plus particulièrement son conseiller en communication, Gilles E. Néron. Il tient des propos erronés dans sa critique de notre reportage et nous tenons à rectifier les faits.*

On présente M. Thériault comme quelqu'un qui a bien raison de faire ces menaces. Vous n'avez pas fait référence au fait qu'il est le frère de ce Thériault, le Pape de la Secte de l'Amour infini qui avait coupé le bras de sa conjointe. [Extrait de la lettre de M. Néron]

M. Thériault, êtes-vous le frère de Rock Thériault, celui qu'on appelle aussi Moïse?

Yvon Thériault

Absolument pas.

Ni le frère ni parent ni de près ou de loin. S'il faut en faire la preuve, voici mon certificat de naissance qui est

my birth certificate, which is from New Brunswick: Drummond, New Brunswick, the son of René Thériault.

I even obtained a copy of Rock Thériault's baptismal certificate, which doesn't come from New Brunswick but from the parish of the Cathedral in Chicoutimi. Rock Thériault was born in Rivière du Moulin, near Chicoutimi. When he was young, his family moved to Abitibi and then moved to Thetford Mines not long after that.

I found out that the CNQ was spreading totally unverified information like this and I would suggest that they check their facts. It's easy to get someone's birth certificate. I was able to do it myself.

. . .

Johanne Faucher

In his criticism, *the CNQ's adviser* claims that we *did not tell the whole truth*.

You also failed to mention in the report that *Mr. Lacroix was reimbursed by the CNQ for the money he lost*. [Excerpt from Mr. Néron's letter]

In an affidavit, R. Lacroix confirms that he has never received a single penny in compensation from the CNQ. In fact, the CNQ has not yet decided if it will investigate Claude Laurier's case. [Emphasis added by Tellier J.]

The effect of the January 12th broadcast was felt immediately at the CNQ, most particularly by Mr. Néron. A rash of letters were received from notaries who, after seeing the broadcast, expressed indignation and dismay about the communication policies of the CNQ. Nobody from the CNQ contacted Mr. Néron the next day, but a communiqué signed by its president was circulated to all notaries and professional corporations, the Interprofessional Council, the media, the Office des professions and the Minister of Justice. The CNQ asserted that Mr. Néron had sent his letter on his own, without its authorization:

[TRANSLATION] On January 12, 1995, Le Point (CBC) quoted two specific passages from a letter written by Gilles E. Néron, an outside communications consultant, to the program's director in response to a report that had aired on December 15, 1994, concerning the Ordre professionnel's mission to protect the public.

du Nouveau-Brunswick, Drummond, N.-B., fils de René Thériault.

Alors je me suis même procuré le certificat de baptême de Rock Thériault qui vient non pas du N.-B. mais de la paroisse de la Cathédrale de Chicoutimi. Rock Thériault est né à Rivière du Moulin près de Chicoutimi. Quand il était jeune, sa famille est déménagée en Abitibi puis peu après, ils sont déménagés à Thetford Mines.

J'ai appris justement que la CNQ véhiculait ce type d'information absolument non vérifiée et je leur conseillerais de vérifier. C'est facile de se procurer le certificat de naissance des individus. J'ai pu le faire moi-même.

. . .

Johanne Faucher

Dans sa critique, *le conseiller de la CNQ* soutient que nous *n'avons pas dit toute la vérité*.

Vous ne dites pas non plus que *M. Lacroix avait été remboursé par la CNQ pour les sommes qu'il a perdues*. [Extrait de la lettre de M. Néron]

R. Lacroix confirme dans un affidavit qu'il n'a jamais reçu un cent en dédommagement de la part de la CNQ. En fait, la CNQ n'a pas encore décidé de faire enquête dans l'affaire Claude Laurier. [Italiques ajoutés par le juge Tellier.]

La CNQ et, tout particulièrement, M. Néron sentent immédiatement les effets du reportage du 12 janvier. La CNQ reçoit une multitude de lettres de notaires qui, après avoir vu le reportage, lui expriment leur indignation et leur mécontentement au sujet de ses politiques de communication. Personne de la CNQ ne communique avec M. Néron le lendemain, mais un communiqué signé par la présidente de la CNQ est transmis à tous les notaires et ordres professionnels, au Conseil interprofessionnel, aux médias, à l'Office des professions et au ministre de la Justice. La CNQ affirme que M. Néron a envoyé la lettre de sa propre initiative, sans son autorisation :

Le 12 janvier 1995, Le Point (Radio-Canada) citait particulièrement deux extraits d'une lettre adressée par M. Gilles E. Néron, consultant externe en communications, à la réalisatrice de cette émission en réaction à une précédente émission diffusée le 15 décembre 1994 relativement à la mission de protection du public de l'Ordre professionnel.

We would like to state that Mr. Néron sent this letter on his own initiative, without instructions from or the prior authorization or consent of the Chambre des notaires du Québec.

Louise Bélanger,
President

Nous tenons à préciser que cette initiative relève de M. Néron sans mandat ou autorisation préalable de la Chambre des notaires du Québec.

M^e Louise Bélanger, présidente

9 Not long thereafter, on January 19, 1995 to be precise, at a meeting of the CNQ's Administrative Committee, it was decided that the CNQ would immediately terminate contractual relations with Mr. Néron and his company. Mr. Néron received a letter of termination from the president that same day.

10 On January 24, 1995, another communiqué was signed by the president and sent to all notaries and professional corporations, the media, the Interprofessional Council, the Office des professions and the Minister of Justice. This communiqué made it known that the CNQ had terminated its business relationship with Mr. Néron and his company. The final two paragraphs of this communiqué read as follows:

[TRANSLATION] Furthermore, the Chambre des notaires will be meeting soon with the Le Point team to correct the negative perceptions conveyed on two occasions in these programs and to explore the possibility of airing a new report that would more accurately reflect the professionalism and integrity of notaries and of the Ordre.

Also, the Chambre des notaires has ceased all business relations with the communications firm Gilles E. Néron, Communication marketing inc.

It would be six months before Mr. Néron learned of the wide distribution of this memo. The effect on him would be devastating.

11 On May 18, 1995, Mr. Néron lodged a complaint with the Conseil de presse du Québec against Ms. Lescop and Ms. Faucher, and he later included Jean Pelletier as editor-in-chief. A similar complaint was filed with the CBC's ombudsman. The Conseil de presse decided to abandon its investigation into Mr. Néron's complaints on December 18, 1996, stating that the affair was *sub judice*. On July 12, 1995, the CBC's ombudsman, Mr. Mario Cardinal, rendered a decision concerning Mr. Néron's complaints. He dismissed four of the grievances, but acknowledged that one of them was well founded:

Peu après, plus précisément le 19 janvier 1995, au cours d'une réunion du comité administratif de la CNQ, il est décidé de mettre fin immédiatement aux rapports contractuels de la CNQ avec M. Néron et sa société. Le même jour, M. Néron reçoit une lettre de résiliation rédigée par la présidente.

Le 24 janvier 1995, un autre communiqué signé par la présidente est transmis à tous les notaires et ordres professionnels, aux médias, au Conseil interprofessionnel, à l'Office des professions et au ministre de la Justice. On y indique que la CNQ a mis fin à ses relations d'affaires avec M. Néron et sa société. Le communiqué se termine par les deux paragraphes suivants :

De plus, la Chambre des notaires rencontrera prochainement l'équipe du Point afin de corriger les perceptions négatives qui ont été véhiculées à deux occasions dans ces émissions et d'envisager la possibilité d'un nouveau reportage qui reflèterait davantage le professionnalisme et l'intégrité des notaires et de l'Ordre.

Aussi, la Chambre des notaires a cessé toutes relations d'affaires qui l'unissaient à la firme de communication Gilles E. Néron Communication marketing inc.

Cette large diffusion du communiqué dont M. Néron ne prend connaissance que six mois plus tard a sur lui un effet dévastateur.

Le 18 mai 1995, celui-ci dépose une plainte auprès du Conseil de presse du Québec contre M^{mes} Lescop et Faucher et, plus tard, contre M. Jean Pelletier en sa qualité de rédacteur en chef de l'émission. Une plainte semblable est déposée auprès de l'ombudsman de la SRC. Le 18 décembre 1996, le Conseil de presse renonce à poursuivre son enquête sur les plaintes de M. Néron, en alléguant que l'affaire est *sub judice*. Le 12 juillet 1995, l'ombudsman de la SRC, M. Mario Cardinal, rend sa décision sur les plaintes de M. Néron. Il rejette quatre des griefs formulés, tout en reconnaissant le bien-fondé de l'un de ceux-ci :

[TRANSLATION] You also accuse them of referring to two errors you allegedly made in your letter in order to make a story out of them. This part of your complaint is valid. *Le Point* decided to air a program entitled *Mise au point*, which it even described as a response to your criticism. Such a broadcast, like any news broadcast, must be subject to the journalistic principles of accuracy, integrity and fairness. The January 12 broadcast seriously compromised the principle of fairness by failing to mention the five grievances that are central to your letter and only reporting on the two errors. The host did say at the beginning of the program, “*One of its [the CNQ’s] communications advisers wrote to us, accusing us of having made several errors. Tonight, we will respond to this criticism*”. It might have been expected that the “errors” you accused them of making would be looked at one by one in the program and that the point of view you expressed would be reflected impartially, thereby treating your criticism fairly and with dignity. This was not the case. In my view, making a complaint is the same as expressing an opinion. Therefore, when a complaint is discussed on air, the person making the complaint should be accorded the same rights and respect as any other person interviewed for a program, and the excerpts from the complaint that are actually broadcast must be selected, similarly to how an interview is edited, so as to represent the essence of the complaint, without distortion.

Instead, they chose to discuss only the two errors in your letter. This gave the program the appearance of a settling of accounts, something that has no place at the CBC. . . . [Emphasis in original.]

On January 11, 1996, GEN Communication and Gilles E. Néron in his personal capacity initiated a claim for damages against the CBC, the CBC’s ombudsman, and the CNQ in the amounts of \$1,650,000 for the company and \$4,285,608 for Mr. Néron. The claims against the Ombudsman and the CNQ are not before this Court. The claim against the CBC is essentially one of extra-contractual liability under art. 1457 of the *Civil Code of Québec*, S.Q. 1991, c. 64 (“C.C.Q.”).

III. Decisions of the Courts Below

A. *Superior Court*, [2000] R.J.Q. 1787

On June 20, 2000, Tellier J. rendered judgment. He found the CBC and the CNQ liable and ordered

Vous leur reprochez aussi d’avoir référé à deux erreurs que vous auriez commises dans votre lettre pour en faire une nouvelle. Cet élément de votre plainte est sérieux. *Le Point* décide de diffuser une émission intitulée *Mise au point*, précisant même qu’il s’agit d’une réponse à la critique. Une telle émission, comme toute émission d’information, se doit d’appliquer les principes journalistiques d’exactitude, d’intégrité et d’équité. Or, l’émission du 12 janvier a sérieusement péché contre le principe de l’équité en omettant de faire état des cinq griefs qui constituaient l’essentiel de votre lettre pour ne retenir que les deux erreurs. L’animateur avait pourtant dit en début d’émission : « *L’un des conseillers en communication nous a écrit pour nous reprocher des erreurs que nous aurions commises. Nous répondons ce soir à cette critique* ». On se serait alors attendu à ce que les « erreurs » que vous leur reprochiez soient reprises une à une dans l’émission, reflétant ainsi en toute impartialité le point de vue que vous avez exprimé et traitant, de ce fait, votre critique avec justice et dignité. Ce ne fut pas fait. Je considère que formuler une plainte, c’est exprimer une opinion. Aussi, lorsqu’il est fait état d’une plainte en ondes, l’auteur de cette plainte doit bénéficier des mêmes droits et du même respect que n’importe quelle personne interviewée en vue d’une émission et les extraits de la plainte qui sont retenus pour l’émission, un peu à la manière d’un montage d’interview, doivent être choisis de façon à en retenir l’essentiel, sans déformation.

De votre lettre, on a plutôt choisi de ne retenir que vos deux erreurs. Ce qui donnait à l’émission une allure de règlement de compte qui n’a pas place à Radio-Canada. . . [En italique dans l’original.]

Le 11 janvier 1996, GEN Communication et Gilles E. Néron personnellement intentent contre la SRC, l’ombudsman de la SRC et la CNQ une action en dommages-intérêts dans laquelle ils réclament 1 650 000 \$ pour la société et 4 285 608 \$ pour M. Néron. Les poursuites engagées contre l’ombudsman et la CNQ ne sont pas en cause devant notre Cour. L’action contre la SRC est essentiellement un recours en responsabilité extracontractuelle fondé sur l’art. 1457 du *Code civil du Québec*, L.Q. 1991, ch. 64 (« C.c.Q. »).

III. Décisions des tribunaux d’instance inférieure

A. *Cour supérieure*, [2000] R.J.Q. 1787

Le 20 juin 2000, le juge Tellier rend son jugement. Il conclut à la responsabilité de la SRC et de

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them to pay damages to the plaintiffs Néron and GEN Communication.

la CNQ et leur ordonne de verser des dommages-intérêts aux demandeurs M. Néron et GEN Communication.

14 The case against the CBC was grounded in art. 1457 C.C.Q. Mr. Néron and his company asserted that the CBC had defamed them in the preparation and in the content of a public information program. Only the content of the January 12th broadcast was called into question. Tellier J. found that the journalists were subject to an obligation of means (*Société Radio-Canada v. Radio Sept-Îles Inc.*, [1994] R.J.Q. 1811 (C.A.)). According to the judge, the use in the broadcast of Mr. Néron's handwritten letter of December 18, 1994 was problematic. The letter was an attempt to arrange a meeting and set things straight. The trial judge found that the letter was not a formal response to the December broadcast, but a set of specific concerns the CNQ had, which were listed with a view to obtaining a meeting to further discuss the matter.

L'action contre la SRC est fondée sur l'art. 1457 C.c.Q. Monsieur Néron et sa société allèguent que la SRC les a diffamés dans la préparation et le contenu d'une émission d'information publique. Seul le contenu du reportage diffusé le 12 janvier est en cause. Le juge Tellier estime que les journalistes étaient assujettis à une obligation de moyens (*Société Radio-Canada c. Radio Sept-Îles Inc.*, [1994] R.J.Q. 1811 (C.A.)). Selon lui, le problème est le fait d'avoir utilisé, dans le reportage, la lettre manuscrite du 18 décembre 1994 de M. Néron. Dans cette lettre, M. Néron sollicite une rencontre afin de rétablir les faits. Le juge de première instance conclut que la lettre est non pas une réaction officielle au reportage de décembre, mais une énumération de préoccupations particulières de la CNQ ayant pour but d'obtenir une rencontre qui permettra d'approfondir le débat.

15 The trial judge rejected the journalists' contention that the letter was an official document of the CNQ. It was a handwritten letter with Mr. Néron's letterhead and should be considered a "private letter". The journalists should have sought the author's permission before going public with the letter, which they did not do.

Le juge de première instance rejette l'argument des journalistes voulant que la lettre soit un document officiel de la CNQ. Il s'agit d'une lettre manuscrite qui porte l'en-tête de M. Néron et qui doit être considérée comme une « missive privée ». Les journalistes auraient dû demander la permission de son auteur avant de la rendre publique, ce qui n'a pas été fait.

16 The trial judge conceded that the letter contained two errors. *Le Point's* journalists were perfectly aware of this and let Mr. Néron know they were on January 10, 1995, two days before the broadcast. In response, Mr. Néron requested three days to verify the information. Nevertheless, the erroneous portions of the letter were broadcast only two days later. This, said the trial judge, had the effect of denying Mr. Néron the opportunity to correct his mistakes.

Le juge de première instance reconnaît que la lettre comporte deux inexactitudes. Les journalistes du *Point* le savaient parfaitement et en ont fait part à M. Néron le 10 janvier 1995, soit deux jours avant la diffusion du reportage. La réaction de M. Néron a consisté à demander trois jours pour vérifier l'exactitude de ses propos, ce qui n'a pas empêché les journalistes de diffuser les passages inexacts de la lettre deux jours plus tard seulement. Selon le juge de première instance, ce comportement a toutefois empêché M. Néron de corriger les inexactitudes en question.

17 The trial judge found that the second broadcast tended to show that the journalists considered the letter to be a criticism of their work. Tellier J. was in agreement with the decision of CBC's

Le juge de première instance conclut que le deuxième reportage tend à démontrer que les journalistes percevaient la lettre comme une critique de leur travail. Le juge Tellier souscrit à la décision de

ombudsman. *Le Point's* journalists committed errors of their own. They had a duty to deal fairly with the whole of the criticism. Instead they singled out Mr. Néron's errors in a manner which amounted more to a settling of accounts. Although it is possible that *Le Point's* journalists were subject to time constraints, this cannot justify violating a person's right to respect for his or her reputation and privacy (arts. 3, 35 and 36 C.C.Q. and ss. 4 and 5 of the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 ("Quebec Charter")).

Tellier J.'s first step, before assessing damages, was to affirm his reprobation of the acts committed by the defendants CBC and CNQ. This he saw as necessary and proper in circumstances like these where the fundamental rights of a person have been violated.

The trial judge found that the damage sustained by Mr. Néron was evident and substantial. Before the events in question he had a decent standard of living and was widely respected and appreciated by his clients. At the time judgment was rendered, he had lost everything, including his partner, his co-owned property and his automobile. He was forced to cash in his retirement fund to pay for a modest two-room apartment. In addition, he had undergone treatment to combat depression. Tellier J. noted that no one wants to place their trust in a communications counsellor who no longer has good relations with the media. The trial judge concluded as follows, at p. 1823:

[TRANSLATION] Since December 1994, Néron has lost all credibility in his field. His biggest client wrongfully repudiated him and made sure everyone knew about it. For its part, the CBC aired its second report, disclosing a letter without first obtaining the author's authorization, and committed other wrongful acts against him. The combined effect of these two events was to put an abrupt end to his career as a communications adviser with no hope of resuming it.

Tellier J. awarded Mr. Néron, in his personal capacity, \$475,000 for loss of salary and other pecuniary benefits. The judge awarded moral damages in the amount of \$300,000, based on his finding

l'ombudsman de la SRC. Les journalistes du *Point* ont eux-mêmes commis des erreurs. Ils se devaient de traiter de manière équitable l'ensemble de la critique. Ils ont plutôt choisi de retenir les affirmations inexactes de M. Néron d'une manière qui s'apparentait davantage à un règlement de compte. Bien qu'il se puisse que les journalistes du *Point* aient été soumis à des contraintes de temps, cela ne saurait justifier de porter atteinte au droit d'une personne à la sauvegarde de sa réputation et au respect de sa vie privée (art. 3, 35 et 36 C.c.Q., de même que les art. 4 et 5 de la *Charte des droits et libertés de la personne*, L.R.Q., ch. C-12 (« Charte québécoise »)).

Avant de procéder à l'évaluation des dommages, le juge Tellier précise qu'il désapprouve les actes des défenderesses SRC et CNQ. Il croit nécessaire et approprié de le faire dans un cas comme celui dont il est saisi, où il y a atteinte aux droits fondamentaux d'une personne.

Selon le juge de première instance, M. Néron a subi des dommages évidents et importants. Jusqu'aux événements en question, M. Néron avait un niveau de vie décent et était fort respecté et apprécié par sa clientèle. À la date du jugement, il avait tout perdu, y compris sa compagne, son appartement en copropriété et son automobile. Il lui a fallu encaisser son fonds de retraite pour vivre dans un modeste appartement de deux pièces. En outre, il a dû être traité pour une dépression. Le juge Tellier note que personne ne souhaite faire confiance à un conseiller en communication qui n'a plus de bons rapports avec les médias. Il tire la conclusion suivante (p. 1823) :

Depuis décembre 1994, Néron est un homme brûlé dans son milieu d'activités. Son principal client l'a, à tort, désavoué et s'est arrangé pour que tout le monde le sache. De son côté, la SRC diffuse son deuxième reportage et divulgue une lettre-missive [*sic*] sans autorisation préalable de son auteur et commet à son endroit d'autres actes fautifs. Ces deux événements conjugués ont pour effet de mettre fin abruptement et sans espoir de retour à toute activité de conseiller en communication.

Le juge Tellier accorde à M. Néron personnellement la somme de 475 000 \$ pour la perte de salaire, ainsi que d'autres avantages pécuniaires. Le juge lui accorde 300 000 \$ pour des

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that the same elements were in play in this case as in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130. The judge then considered jurisprudence indicating that a party can request the payment of extrajudicial fees if they have resulted from the adverse party's bad faith. The judge awarded \$246,311.54 in this respect for the legal fees of lawyers past and present, the costs of expert evidence, and the time that Mr. Néron spent personally preparing his case. Having concluded that the fault of the CBC and its journalists was intentional, the learned judge granted a further \$50,000 in exemplary damages, to be divided equally between Mr. Néron and his company GEN Communication. Finally, the trial judge dismissed Mr. Néron's claims in respect of his personal debt and the loss of his RRSP. Tellier J. considered that both these items were covered by the award for lost salary. In total, Mr. Néron was personally granted damages in the order of \$1,039,207. With the exception of the exemplary damages, the judge decided that the liability was solidary and that the damages (other than exemplary), with interest and an additional indemnity (art. 1619 C.C.Q.), were to be split equally (50-50) between the CBC and its journalists on the one hand and the CNQ on the other.

dommages moraux, compte tenu de sa conclusion que les éléments en jeu sont les mêmes que dans l'affaire *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130. Le juge prend ensuite en considération la jurisprudence selon laquelle une partie peut réclamer le montant des honoraires extrajudiciaires lorsque ceux-ci résultent de la mauvaise foi de la partie adverse. À cet égard, il accorde 246 311,54 \$ pour les honoraires d'avocats antérieurs et actuels, le coût de la preuve d'expert et le temps que M. Néron a lui-même consacré à la préparation de son dossier. Après avoir conclu que la faute commise par la SRC et ses journalistes était intentionnelle, le juge accorde une somme additionnelle de 50 000 \$ à titre de dommages-intérêts exemplaires, que M. Néron et sa société GEN Communication se partageront en parts égales. Enfin, le juge de première instance rejette les réclamations de M. Néron relatives à son endettement personnel et à la perte de son REER. Le juge Tellier estime que ces deux postes sont inclus dans la somme accordée pour la perte de salaire. En tout, M. Néron se voit accorder personnellement des dommages-intérêts de 1 039 207 \$. Sauf en ce qui concerne les dommages-intérêts exemplaires, le juge décide que la responsabilité est solidaire et que la SRC et ses journalistes, d'une part, et la CNQ, d'autre part, seront respectivement tenus de payer la moitié des dommages-intérêts (autres que les dommages-intérêts exemplaires) plus les intérêts, ainsi qu'une indemnité additionnelle (art. 1619 C.c.Q.).

21 The pecuniary losses of GEN Communication were set at \$200,000 for loss of sales and \$25,000 for defamation, and \$50,000 was awarded in exemplary damages. Here again, with the exception of the exemplary damages, the learned judge determined that the liability was solidary and, consequently, that the sum of \$225,000, with interest and an additional indemnity (art. 1619 C.C.Q.), was to be shared equally between the CBC and its journalists on the one hand, and the CNQ on the other.

Quant aux pertes pécuniaires de GEN Communication, le juge accorde 200 000 \$ pour perte du chiffre d'affaires et 25 000 \$ pour atteinte à la réputation, plus 50 000 \$ de dommages-intérêts exemplaires. Là encore, sauf en ce qui concerne les dommages-intérêts exemplaires, le juge décide que la responsabilité est solidaire et que, par conséquent, la SRC et ses journalistes, d'une part, et la CNQ, d'autre part, seront respectivement tenus de payer la moitié de la somme de 225 000 \$ plus les intérêts, ainsi qu'une indemnité additionnelle (art. 1619 C.c.Q.).

22 Finally, Tellier J. ordered provisional execution for payment in full of the exemplary

Le juge Tellier ordonne enfin l'exécution provisoire pour le plein montant des dommages-

damages, lawyer's fees and personal preparation costs (art. 547 of the *Code of Civil Procedure*, R.S.Q., c. C-25). As concerns the rest of the damage award, the provisional execution order was set at 50 percent of the amount. The Quebec Court of Appeal would later reduce the amount of this provisional execution order to \$200,000 while the matter was before that court.

The trial judge dealt with several other legal issues that are no longer relevant to the outcome of this appeal. He rejected Mr. Néron's claim against the CBC's ombudsman for having rebroadcast the content of the *Mise au Point* segment without his authorization, based on the absence of causation and on the absence of intention on the Ombudsman's part. The judge dismissed Mr. Thériault's action against Néron and GEN Communication, stating that any damage to Mr. Thériault's reputation caused by the broadcast of the content of the letter was the responsibility of the CBC and of Mr. Thériault himself. As for the actions in warranty, the judge ordered the CBC and the Commerce Group to pay the costs of the actions in warranty against each of them, and also ordered the Commerce Group to pay \$82,103 to Gilles E. Néron with interest and an additional indemnity starting from the time of the summons.

Néron and GEN Communication's action against the CNQ is of greater relevance to this appeal because the trial judge held the CNQ and the CBC to be solidarily liable, on a 50-50 basis, for all the above-mentioned damages, with the exception of the exemplary damages. The trial judge found that the CNQ was liable in contract to Néron and his company. Under art. 2125 C.C.Q., the CNQ had the right to unilaterally end its contractual relations with Néron and GEN Communication. However, the means used to do so were indicative of bad faith on the CNQ's part. The trial judge concluded that the CNQ had put an end to the contract for false reasons, which the CNQ intentionally circulated to a broad public. By doing so, it caused damage to Mr. Néron and his company.

intérêts exemplaires, des honoraires d'avocat et des frais de préparation personnelle (art. 547 du *Code de procédure civile*, L.R.Q., ch. C-25). Quant au reste des dommages-intérêts accordés, il ordonne l'exécution provisoire pour la moitié du montant. La Cour d'appel du Québec réduit, par la suite, à 200 000 \$ le montant de l'exécution provisoire pendant qu'elle instruit l'affaire.

Le juge de première instance résout plusieurs autres questions de droit qui ne sont plus pertinentes pour trancher le présent pourvoi. Il invoque l'absence de lien de causalité et d'intention de la part de l'ombudsman de la SRC pour rejeter l'argument de M. Néron voulant que l'ombudsman ait rediffusé, sans son autorisation, le contenu de la *Mise au Point*. Le juge rejette le recours de M. Thériault contre M. Néron et GEN Communication, pour le motif que tout dommage que la diffusion du contenu de la lettre a pu causer à la réputation de M. Thériault est imputable à la SRC et à M. Thériault lui-même. En ce qui concerne les actions en garantie, le juge ordonne à la SRC et au Groupe Commerce de payer les dépens des actions en garantie intentées contre chacune d'elles. Il ordonne aussi au Groupe Commerce de payer à M. Gilles E. Néron la somme de 82 103 \$ plus les intérêts, ainsi qu'une indemnité additionnelle à compter de l'assignation.

Le recours de M. Néron et de GEN Communication contre la CNQ demeure plus pertinent en l'espèce, du fait que le juge de première instance a tenu la CNQ et la SRC solidairement responsables, pour la moitié chacune, de tous les dommages-intérêts susmentionnés, à l'exception des dommages-intérêts exemplaires. Le juge considère que la responsabilité contractuelle de la CNQ est engagée à l'égard de M. Néron et de sa société. Aux termes de l'art. 2125 C.c.Q., la CNQ pouvait mettre fin unilatéralement à ses rapports contractuels avec M. Néron et GEN Communication. Cependant, la manière dont elle l'a fait dénote de la mauvaise foi de sa part. Le juge de première instance conclut donc que la CNQ a mis fin au contrat pour de faux motifs qu'elle a intentionnellement communiqués au grand public. Ce faisant, elle a causé un préjudice à M. Néron et à sa société.

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B. *Quebec Court of Appeal*, [2002] R.J.Q. 2639

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The CBC (including its journalists and the Ombudsman), the CNQ and Mr. Thériault all appealed. Gilles E. Néron and GEN Communication cross-appealed against the CBC and the CNQ, seeking a revision of Tellier J.'s decision not to include in his damage calculations Mr. Néron's RRSP loss of \$440,901 and personal debt of \$48,500. Mr. Néron and GEN Communication also sought to vary the judgment below with respect to the liability of the Ombudsman and damages stemming from his actions, which were claimed to be in the order of \$75,000 for damage to reputation and \$200,000 (\$100,000 × 2) in exemplary damages. Mr. Néron and GEN Communication further sought authorization to amend their claim for exemplary damages against the CBC by raising it to \$500,000 for each appellant, or \$1,000,000 in total, based on *Hill*, *supra*, and *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18.

(1) Majority Judgment of Mailhot and Fish J.J.A.(a) *Mailhot J.A.*

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Dealing with the appeal of the CBC and its journalists, Mailhot J.A. considered the trial judge's ruling that Mr. Néron's handwritten letter was a private letter to be wrong. The letter could not be considered private, as it was addressed to a media organization with a clear public role, and to a person who was the director of a television program. Without some contrary indication, it would be difficult to conclude that the letter was private. Mailhot J.A. noted that this Court had held in *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421, that a media outlet that receives information can presume that it has consent to broadcast it, absent any indications to the contrary. Here, the letter was written by someone with a mandate from the CNQ, which points to its being more public in nature. Furthermore, Mr. Néron's actions indicated that he understood that the content of the letter could

B. *Cour d'appel du Québec*, [2002] R.J.Q. 2639

La SRC (y compris ses journalistes et son ombudsman), la CNQ et M. Thériault interjettent tous appel. Monsieur Gilles E. Néron et GEN Communication interjettent contre la SRC et la CNQ un appel incident en vue d'obtenir la révision de la décision du juge Tellier de ne pas inclure, dans le calcul des dommages, les sommes de 440 901 \$ et de 48 500 \$ correspondant respectivement à la perte d'un REER et à l'endettement personnel de M. Néron. Monsieur Néron et GEN Communication sollicitent également la révision du jugement de première instance relativement à la responsabilité de l'ombudsman et aux dommages découlant de ses actes, qui, selon eux, s'élevaient à 75 000 \$ pour atteinte à la réputation et à 200 000 \$ (100 000 \$ × 2) de dommages-intérêts exemplaires. Monsieur Néron et GEN Communication invoquent les arrêts *Hill*, précité, et *Whiten c. Pilot Insurance Co.*, [2002] 1 R.C.S. 595, 2002 CSC 18, pour demander en plus l'autorisation de modifier le montant des dommages-intérêts exemplaires réclamés à la SRC, de manière à le majorer à 500 000 \$ pour chacun d'eux, soit à 1 000 000 \$ en tout.

(1) Motifs majoritaires des juges Mailhot et Fisha) *La juge Mailhot*

Examinant d'abord l'appel de la SRC et de ses journalistes, la juge Mailhot qualifie d'erronée la décision du juge de première instance selon laquelle la lettre manuscrite de M. Néron est une missive privée. La lettre ne saurait être qualifiée de privée étant donné qu'elle est adressée à un média dont le rôle public est évident et à une personne qui est la réalisatrice d'une émission de télévision. À moins d'indication contraire, on la qualifierait difficilement de missive privée. La juge Mailhot fait observer que, dans l'arrêt *Société Radio-Canada c. Lessard*, [1991] 3 R.C.S. 421, notre Cour a conclu qu'un média qui reçoit des informations peut, en l'absence d'indication contraire, présumer le consentement à leur diffusion. En l'espèce, la lettre a été rédigée par une personne autorisée par la CNQ, ce qui porte à croire qu'elle est davantage de nature publique. En outre, les actes de M. Néron indiquent

be broadcast once he had had time to verify the purported errors. It could not be said that it was a private letter.

Mailhot J.A. found, however, that Mr. Néron had clearly not given his consent to the publication of the letter and had indeed asked that the letter not be aired before he had had time to verify the two errors. Clearly the object of the letter was to arrange a meeting. For these reasons, the CBC had an obligation to at least afford Mr. Néron the time he had requested before broadcasting the content of the letter. Mailhot J.A. agreed with the trial judge that the CBC's actions looked more like a settling of accounts. The CBC knew that the information in the letter about Mr. Thériault and Mr. Lacroix was false but chose to point the errors out on television even though it knew that Mr. Néron was taking the time to look into them. Mailhot J.A. quoted with approval, at para. 73, the following passage from the reasons of the learned trial judge:

[TRANSLATION] Similarly, the evidence shows that on January 10, 1995, Faucher contacted Néron to tell him that the letter of December 18 contained two inaccurate statements. Faucher acknowledges that Néron's reaction was one of surprise and that he asked her for a few days to check the accuracy of his statements. Néron says that he asked her for three days. This conversation took place on January 10, and the program aired on January 12, before Néron was even able to get back to her with his version.

Thus, the following question must be asked: Why was there such a rush to air the second report, which contained information known to be false, without giving Néron the opportunity to check and correct the statements that turned out to be inaccurate? Can it not be assumed that, if Néron had been able to give his side of the story and correct the inaccuracies, the content of the report would have been different? This haste is attributable not only to the journalist, but to the entire team.

Pelletier, the editor-in-chief, admitted to the Court that he was aware of the telephone conversation that took place between Faucher and Néron on January 10, 1995. He knew that Néron had asked for a short period of time to check the information himself. He knew that the Chambre [des notaires] had refused to comment on the

qu'il comprenait que le contenu de la lettre pourrait être diffusé une fois qu'il aurait eu le temps de vérifier les affirmations qualifiées d'inexactes. On ne pouvait donc pas affirmer que la lettre était une missive privée.

La juge Mailhot conclut toutefois qu'il est évident que M. Néron n'a pas consenti à la publication de la lettre et qu'il a, en fait, demandé de ne pas la diffuser avant qu'il ait eu le temps de vérifier les prétendues affirmations inexactes. La lettre avait nettement pour objet d'organiser une rencontre. Pour ces motifs, la SRC se devait à tout le moins d'accorder à M. Néron le délai sollicité avant de diffuser le contenu de la lettre. La juge Mailhot convient avec le juge de première instance que les actes de la SRC avaient davantage l'allure d'un règlement de compte. La SRC savait que les informations que la lettre contenait au sujet de MM. Thériault et Lacroix étaient fausses, mais elle a choisi de les révéler à la télévision tout en sachant que M. Néron était en train de les vérifier. La juge Mailhot cite et approuve, au par. 73, le passage suivant des motifs du juge de première instance :

Dans le même ordre d'idée[s], la preuve révèle que, le 10 janvier 1995, Faucher communique avec Néron pour lui signaler que la lettre du 18 décembre contenait deux affirmations inexactes. Elle reconnaît aussi que la réaction de Néron en fut une d'étonnement et que celui-ci lui a demandé quelques jours pour vérifier l'exactitude de ses propos. Néron affirme lui avoir demandé trois jours. Cette conversation a lieu le 10 janvier et l'émission est diffusée le 12, avant même que Néron ait pu revenir avec sa version.

Alors se pose la question : Pourquoi cette précipitation et cette hâte à diffuser ce deuxième reportage qui contient des informations que l'on sait être fausses et qu'on n'a pas donné à Néron la faculté de vérifier et corriger les affirmations qui s'avèrent être fausses? Est-ce qu'on ne peut pas penser que, si Néron avait pu donner sa version et corriger les inexactitudes, le contenu du reportage aurait été différent? Cette hâte n'est pas seulement le fait de la journaliste mais celui de toute l'équipe.

Pelletier, le rédacteur en chef, a reconnu devant la Cour qu'il était au courant de la conversation téléphonique de Faucher et de Néron du 10 janvier 1995. Il savait que Néron avait demandé un court délai pour vérifier l'information par lui-même. Il savait que la Chambre [des notaires] avait refusé de commenter la lettre et, par

letter and, consequently, on its content. The team nevertheless decided to broadcast the report anyway, which leads one to believe that the decision was deliberate and intentional.

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Mailhot J.A. also agreed with the trial judge that the content of the letter was portrayed in a misleading and incomplete fashion. Instead of an accurate synopsis of the content of the letter, *Le Point*'s journalists engaged in a [TRANSLATION] "wrongful pruning", selectively choosing to highlight only the two errors, and not Mr. Néron's other concerns. Mailhot J.A. agreed with the trial judge that *Le Point*'s journalists took the letter as a criticism of their work [TRANSLATION] "and that they had to show the person who wrote it that you do not attack journalists like that" (para. 81), even if the letter's sole purpose was to arrange a meeting. The apparent purpose of the first broadcast was to look into whether professional bodies like the CNQ were fulfilling their mandate to the public. In the opinion of Mailhot J.A., however, the second broadcast no longer had this as its purpose, but was instead a response to Mr. Néron's criticism of their work. This was evidenced by the fact that in the report *Le Point* used language such as "the CNQ *accuses* us" (para. 74 (*italics in original*)), even though the CNQ had already disassociated itself from the content of the letter.

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Mailhot J.A. found further evidence that *Le Point* was more interested in responding to this criticism than protecting the public interest in the following excerpt from a letter written by the editor-in-chief, Mr. Pelletier, to the Conseil de presse du Québec (at para. 75):

[TRANSLATION] The lawsuit that public relations specialist Gilles E. Néron has brought against us results from his decision to send us, on December 18, 1994, a letter critical of our December 15, 1994 report on his client, the Chambre des notaires du Québec.

This letter, of which he sent a copy to the Chambre des notaires du Québec on the same day he sent it to us, contained very serious accusations levelled not only against *Le Point*, but also against citizens who had for some time been accusing the Chambre of treating them unfairly and who were interviewed as part of our December 15 report on the CNQ.

conséquent, son contenu. Malgré tout cela, l'équipe a décidé de passer le reportage quand même, et il est alors permis de penser que la décision fut arrêtée de propos délibéré et intentionnel.

La juge Mailhot convient également avec le juge de première instance que le contenu de la lettre a été présenté de manière trompeuse et incomplète. Au lieu d'en faire un résumé fidèle, les journalistes du *Point* ont procédé à un « élagage fautif » en choisissant de ne relever que les deux inexactitudes, sans mentionner les autres préoccupations de M. Néron. La juge Mailhot souscrit à l'opinion du juge de première instance selon laquelle les journalistes du *Point* considéraient que la lettre était une critique de leur travail « et qu'il fallait faire comprendre à son auteur qu'on ne s'en prend pas comme ça aux journalistes » (par. 81), et ce, même si la lettre avait seulement pour but d'organiser une rencontre. Le premier reportage visait apparemment à vérifier si des ordres professionnels comme la CNQ remplissaient leur mandat envers le public. Cependant, la juge Mailhot estime que ce n'était plus l'objectif du deuxième reportage, qui se voulait plutôt une réaction à la critique du travail des journalistes formulée par M. Néron, comme en fait foi l'utilisation, dans ce reportage, de termes tels « la CNQ nous *accuse* » (par. 74 (*en italique dans l'original*)), en dépit du fait que la CNQ s'était déjà dissociée du contenu de la lettre.

Selon la juge Mailhot, l'extrait suivant d'une lettre adressée par le rédacteur en chef, M. Pelletier, au Conseil de presse du Québec prouve également que les journalistes du *Point* étaient plus intéressés à répondre à cette critique qu'à protéger l'intérêt public (par. 75) :

Le procès que nous fait M. Gilles E. Néron, relationniste, a été engendré par sa décision de nous transmettre le 18 décembre 1994 une critique de notre reportage du 15 décembre 1994 sur la Chambre des [n]otaires du Québec, son client.

Cette lettre dont il envoie copie à la Chambre des [n]otaires du Québec le jour même où il nous la poste, contenait de très graves accusations contre non seulement *Le Point* mais aussi des citoyens qui accusaient depuis longtemps la Chambre de les avoir injustement traités et qui avaient été interviewés dans le cadre de notre reportage du 15 décembre sur la CNQ.

Mailhot J.A. went on to note that, although it was true that Mr. Lacroix had not been reimbursed by the CNQ, he had been at least partially reimbursed by a third party. This attenuated somewhat the gravity of the error with respect to Mr. Lacroix. She did agree that circulating the unverified rumour that Mr. Thériault was the brother of Roch Thériault could justifiably be considered reprehensible by the journalist, if it was done intentionally. Mailhot J.A. went on to rule that even if it could be said that the CBC had an obligation to inform the public that the CNQ was circulating false information and had a negative attitude towards the people it was supposed to protect, the CBC first had to ensure that the false information was in fact endorsed by the professional order. It is also important to transmit all the information to the public, that is to say, the content of the letter as a whole. It was not sufficient to simply verify that Mr. Néron had a general mandate from the CNQ at the time the letter was written, especially since *Le Point's* journalists knew about the rumours as far back as November 1994, when they were preparing for the first broadcast.

In short, Mailhot J.A. agreed with the trial judge that *Le Point's* journalists had entrapped Mr. Néron and used him to get back at the CNQ. She stated the following at para. 82:

[TRANSLATION] There is no doubt that a news organization may publish information contained in a communication when the information is of public interest. However, if the organization knows that the information is incorrect and that the sender of the communication is unaware of the error and has even asked for a short period of time to check it, if the organization rushes to release the information after first subjecting it to a wrongful pruning, and if what appears on the screen seems to attribute the letter to the author, then, in those circumstances, the organization has maliciously abused its position.

Mailhot J.A. referred to the decision of the Quebec Court of Appeal in *Radio Sept-Îles*, *supra*, at p. 1818. She adopted the definition of civil liability for defamation established in that case and concluded that the trial judge had correctly found fault in the case at bar.

La juge Mailhot ajoute que, même s'il est vrai que M. Lacroix n'a pas été remboursé par la CNQ, il l'a été, du moins en partie, par un tiers. Cela atténue quelque peu la gravité de l'inexactitude relative à M. Lacroix. Elle convient que les journalistes pouvaient considérer à juste titre comme une attitude répréhensible, si elle était intentionnelle, la propagation de la rumeur non vérifiée selon laquelle M. Thériault était le frère de Roch Thériault. Selon elle, même si l'on peut admettre qu'elle était tenue d'informer la population que la CNQ diffusait des faussetés et adoptait une attitude négative à l'égard de gens qu'elle était censée protéger, la SRC devait d'abord s'assurer que ces faussetés avaient été endossées par l'ordre professionnel. Il importe également de transmettre toute l'information au public, c'est-à-dire tout le contenu de la lettre. Il ne suffisait pas de vérifier si M. Néron était investi d'un mandat général de la CNQ à l'époque où il a écrit la lettre, d'autant plus que les journalistes du *Point* étaient au courant de ces rumeurs dès novembre 1994, au moment où ils préparaient le premier reportage.

Bref, la juge Mailhot est d'accord avec le juge de première instance pour conclure que les journalistes du *Point* ont piégé M. Néron et s'en sont servi pour se venger de la CNQ. On trouve ces commentaires au par. 82 :

Certes, un organe d'information peut publier une information contenue dans une communication, lorsque celle-ci contient une information d'intérêt général. Toutefois, si l'organe sait que l'information est erronée, que l'auteur de la communication l'ignore et, au surplus, demande un délai très court pour vérifier, et que cet organe d'information publie précipitamment l'information en cause, au surplus en y faisant un élagage fautif, et que l'image projetée à l'écran semble l'attribuer à l'auteur de la lettre, dans ces circonstances, l'organe abuse de sa situation malicieusement.

La juge Mailhot mentionne l'arrêt de la Cour d'appel du Québec *Radio Sept-Îles*, précité, p. 1818. Faisant sienne la définition de la responsabilité civile pour diffamation qu'on y donne, elle décide que le juge de première instance a eu raison de conclure à l'existence d'une faute en l'espèce.

32 Mailhot J.A. then turned to a consideration of damages. She upheld the trial judge's award for pecuniary and moral damages. The appeal judge did, however, decide that the award for punitive damages was too low. She raised the amount owed by the CBC to Mr. Néron and his company to \$100,000 each from the \$50,000 awarded by the trial judge and stated that the CBC's liability for this amount was not solidary. Mailhot J.A. further clarified that it was the CBC that was to be held liable, and not its employees in any direct sense.

33 Mailhot J.A. adopted the reasons of Fish J.A. (as he then was) who, as shall be noted below, varied the trial judge's decision to find the CNQ and the CBC solidarily liable, ruling instead that the two were to be held liable *in solidum*. Based on a recent decision of the Quebec Court of Appeal in *Viel v. Entreprises immobilières du terroir ltée*, [2002] R.J.Q. 1262, Mailhot J.A. ruled that the trial judge's award of extrajudicial fees should be set aside. She adopted the reasons of Fish J.A. on this point as well, with the exception that she upheld the trial judge's award of \$8,153 for expert fees, which she did not view as extrajudicial fees.

(b) *Fish J.A.*

34 Fish J.A. found that the trial judge committed a palpable error in concluding that the factors in this case were essentially the same as in *Hill*, *supra*. He reduced the trial judge's award of moral damages to \$150,000 from the \$300,000 awarded at trial. He also set aside entirely the moral damages awarded by the trial judge to GEN Communication (\$25,000). He found that the interposition of GEN Communication between the CNQ and Néron provided no legal or logical justification for awarding GEN Communication any moral damages at all. Fish J.A. further reduced, for the same reason, the award of pecuniary damages in favour of GEN Communication to \$25,000 from \$200,000.

La juge Mailhot passe ensuite à l'examen des dommages. Elle confirme les montants de dommages pécuniaires et moraux accordés par le juge de première instance. Toutefois, elle juge insuffisants les dommages-intérêts punitifs qu'il a accordés. Elle fait passer de 50 000 \$ à 100 000 \$ le montant que le juge de première instance a ordonné à la SRC de verser, à ce titre, à M. Néron et à sa société, et précise que la SRC n'est pas solidairement responsable avec la CNQ à l'égard de ce montant. La juge Mailhot ajoute que la SRC doit être tenue responsable, mais qu'aucune condamnation ne doit être prononcée directement contre ses employés.

La juge Mailhot souscrit aux motifs du juge Fish (maintenant juge de notre Cour) qui, comme nous le verrons plus loin, modifie la décision du juge de première instance de tenir la CNQ et la SRC responsables solidairement, et conclut qu'elles doivent plutôt être tenues responsables *in solidum*. Se fondant sur l'arrêt récent de la Cour d'appel du Québec *Viel c. Entreprises immobilières du terroir ltée*, [2002] R.J.Q. 1262, la juge Mailhot statue qu'il y a lieu d'annuler la condamnation aux honoraires extrajudiciaires prononcée par le juge de première instance. Elle souscrit également aux motifs du juge Fish sur ce point, sauf qu'elle confirme la décision du juge de première instance d'accorder la somme de 8 153 \$ pour les frais d'expertise, qu'elle ne perçoit pas comme des honoraires extrajudiciaires.

b) *Le juge Fish*

Le juge Fish estime que le juge de première instance a commis une erreur manifeste en concluant que les éléments en jeu en l'espèce sont sensiblement les mêmes que dans l'affaire *Hill*, précitée. Il réduit à 150 000 \$ le montant de dommages moraux de 300 000 \$ accordé en première instance. De même, il annule complètement la somme de 25 000 \$ que ce dernier a accordé à titre de dommages moraux à GEN Communication. Selon lui, l'interposition de GEN Communication entre la CNQ et M. Néron ne justifiait ni juridiquement ni logiquement l'attribution de dommages moraux à GEN Communication. De plus, le juge Fish ramène, pour la même raison, à 25 000 \$ le montant de dommages pécuniaires de 200 000 \$ accordé à GEN Communication.

Fish J.A. otherwise agreed with Mailhot J.A. that the CBC's *Mise au Point* segment was defamatory. It damaged Mr. Néron's reputation by misrepresenting his letter to Ms. Lescop as a disingenuous attempt to mislead the CBC and, through it, the public that is its audience. Neither of the CBC's defences to this established defamation could stand. Its claim that Mr. Néron consented to the January 12th broadcast is contradicted by the evidence that the letter was aimed at arranging a meeting with Ms. Lescop and by Mr. Néron's evidence that he had repeatedly stressed that the letter was not intended for publication. The CBC's argument that the mere delivery of the letter constituted consent flies in the face of these facts, and of the trial judge's finding that it was evident from both the form and content of the letter that it was not meant for publication.

Fish J.A. then responded to the CBC's second defence, namely that its constitutionally enshrined freedom of expression and freedom of the press obviated the need for consent. Freedom of expression and freedom of the press do not grant the right to broadcast or publish with impunity letters, telephone calls, faxes and e-mail messages received by electronic or print media that are not sent to them for broadcast or publication. Such communications are "private", in the sense that the senders are entitled to expect that their words will not, without their consent, be made public. Nor can it be said that freedom of expression and freedom of the press carry with them a licence to defame. In purporting to exercise these freedoms, no one may unjustifiably damage another person's reputation.

Finally, Fish J.A. dealt with the CBC's argument that a publisher of defamatory matter can escape condemnation by demonstrating that the impugned publication was carried out in good faith and in the public interest. He held that such a defence cannot stand where, as here, the defamatory material was published "in an incomplete, tendentious or unfair manner" (para. 259). Fish J.A. agreed with the trial judge, and the CBC's ombudsman, that the

Le juge Fish convient par ailleurs avec la juge Mailhot que la *Mise au Point* de la SRC était diffamatoire. Elle a porté atteinte à la réputation de M. Néron en présentant faussement sa lettre à M^{me} Lescop comme une tentative fallacieuse d'induire en erreur la SRC et, du même coup, le public qui constitue son auditoire. Aucun des moyens de défense que la SRC a opposés à cette diffamation prouvée ne saurait être retenu. Son argument voulant que M. Néron ait consenti à la diffusion du reportage du 12 janvier est contredit par la preuve que la lettre avait pour but d'organiser une rencontre avec M^{me} Lescop et que M. Néron avait, à maintes reprises, insisté sur le fait qu'elle n'était pas destinée à être publiée. La prétention de la SRC que la simple remise de la lettre équivalait à un consentement contredit ces faits et la conclusion du juge de première instance selon laquelle il était évident que, compte tenu de sa forme et de son contenu, la lettre n'était pas destinée à être publiée.

Le juge Fish répond ensuite au deuxième moyen de défense de la SRC voulant que le droit à la liberté d'expression et à la liberté de presse que la Constitution lui garantit rende inutile le consentement. La liberté d'expression et la liberté de presse ne permettent pas de diffuser ou de publier, en toute impunité, le contenu des lettres, des appels téléphoniques, des télécopies ou des courriels adressés à la presse électronique ou écrite, qui ne sont pas destinés à être diffusés ou publiés. Ces communications sont « privées » en ce sens que leur auteur est en droit de s'attendre à ce que ses propos ne soient pas rendus publics sans son consentement. On ne saurait dire non plus que la liberté d'expression et la liberté de presse permettent en soi de diffamer. Quiconque prétend exercer ces libertés ne peut porter atteinte de manière injustifiable à la réputation d'autrui.

Enfin, le juge Fish examine l'argument de la SRC selon lequel celui qui publie une matière diffamatoire peut échapper à une condamnation en démontrant que la publication contestée a été faite de bonne foi et dans l'intérêt public. Il conclut que ce moyen de défense ne peut pas être retenu lorsque, comme en l'espèce, la matière diffamatoire est publiée [TRADUCTION] « d'une manière incomplète, tendancieuse ou inéquitable » (par. 259). À l'instar

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broadcast had the appearance of a settling of accounts. “It certainly had that tilt, tone and texture” (para. 264). Moreover, he found no reason to disturb the trial judge’s determination that the two errors in Néron’s letter were not matters of public importance (see para. 272). As such, Fish J.A. found that the broadcast was not a legitimate exercise in freedom of expression, “but rather an abuse by the CBC and its employees of their vast power to influence public perception and to shape public opinion” (para. 272).

du juge de première instance et de l’ombudsman de la SRC, le juge Fish estime lui aussi que le reportage diffusé ressemblait à un règlement de compte ([TRADUCTION] « Il en avait certainement l’allure, le ton et la texture » (par. 264)). De plus, il ne voit aucune raison de modifier la décision du juge de première instance selon laquelle les deux inexactitudes contenues dans la lettre de M. Néron n’étaient pas des questions d’intérêt public (voir par. 272). Pour cette raison, le juge Fish conclut que la diffusion du reportage constituait non pas un exercice légitime de la liberté d’expression, [TRADUCTION] « mais plutôt un exercice abusif du vaste pouvoir d’influencer la perception du public et de façonner son opinion, dont sont investis la SRC et ses employés » (par. 272).

38 Fish J.A. found, as mentioned above, that the trial judge erred in condemning the CNQ and the CBC solidarily. The CBC’s fault was extra-contractual and juridically independent of the contractual fault attributed by the trial judge to the CNQ. Solidarity between debtors exists, as art. 1525 C.C.Q. makes clear, “only where it is expressly stipulated by the parties or imposed by law”. Fish J.A. concluded that neither condition was met in the case at bar. However, although the faults imputed to the CBC and the CNQ are from different sources, they are factually related, reasonably contemporaneous and cumulative in their impact on Mr. Néron and his company. It would be difficult, in these circumstances, to divide the global debt owed to Mr. Néron by the CBC and the CNQ. So Fish J.A. relied on this Court’s decision in *Prévost-Masson v. General Trust of Canada*, [2001] 3 S.C.R. 882, 2001 SCC 87, and concluded that “[i]t seems preferable by far to hold them responsible *in solidum*” (para. 281). Then, based on the findings of the trial judge he held them equally responsible as regards one another.

Comme je l’ai déjà mentionné, le juge Fish estime que le juge de première instance a commis une erreur en condamnant solidairement la CNQ et la SRC. En effet, en raison de son caractère extracontractuel, la faute commise par la SRC était juridiquement indépendante de la faute contractuelle imputée à la CNQ par le juge de première instance. Comme l’indique clairement l’art. 1525 C.c.Q., la solidarité entre les débiteurs n’existe que « lorsqu’elle est expressément stipulée par les parties ou prévue par la loi ». Selon le juge Fish, aucune de ces conditions n’est remplie en l’espèce. Cependant, bien que les fautes imputées à la SRC et à la CNQ proviennent de sources différentes, elles demeurent connexes sur le plan factuel en plus d’être raisonnablement concomitantes, et elles ont une incidence cumulative sur M. Néron et sa société. Dans ces circonstances, il serait difficile de scinder le montant global que la SRC et la CNQ doivent à M. Néron. Le juge Fish se fonde donc sur l’arrêt de notre Cour *Prévost-Masson c. Trust Général du Canada*, [2001] 3 R.C.S. 882, 2001 CSC 87, pour conclure qu’[TRADUCTION] « il semble de loin préférable de les tenir responsables *in solidum* » (par. 281). Ensuite, compte tenu des conclusions du juge de première instance, il les tient aussi mutuellement responsables.

39 Fish J.A. agreed with Mailhot J.A. that this was not a case for an award of extrajudicial fees, or solicitor-client costs, relying on the decision of this Court in *Aubry v. Éditions Vice-Versa inc.*, [1998] 1

Le juge Fish convient avec le juge Mailhot que, compte tenu de l’arrêt de notre Cour *Aubry c. Éditions Vice-Versa inc.*, [1998] 1 R.C.S. 591, la présente affaire ne se prête pas à l’attribution

S.C.R. 591. He further ruled that taking into account all the circumstances, especially the very substantial and generous damages awarded by the trial judge under other heads, he would reduce the award of punitive damages against the CBC and the CNQ to \$15,000 each, payable to Néron alone.

(2) Minority Judgment of Otis J.A.

Otis J.A. agreed with Mailhot J.A.'s assessment of damages, with the exception that she would have awarded solicitor-client costs against the CNQ. Otis J.A. concluded, though, that the CBC and its journalists were not at fault with respect to Mr. Néron and GEN Communication. She noted the trial judge's finding that [TRANSLATION] "[t]he two errors Néron may have unintentionally made originated with the CNQ, which conveyed unfounded rumours" (para. 323). She also focussed on the fact that, in the months following the January 12th broadcast, the Office des professions du Québec had intervened to demand that the CNQ institute a remedial plan, and in the absence of this, threatened to place the CNQ under administrative trusteeship in order to properly assure the protection of the public. The committee formed to address the problems at the CNQ produced a report in November 1995. The trial judge considered this report and noted: [TRANSLATION] "This report is especially critical of the president, the director general and the syndic's office. It recommends a series of measures that are indicative of a deplorable internal situation" (para. 326). Moreover, at about the same time the president, director general and syndic all offered to resign. The two notaries mentioned in the broadcasts were struck off the roll, one of them for life and the other for a period of 32 years. In short, Otis J.A. chose to highlight the positive effects that the January 12th broadcast may have had on protection of the public, and on turning things around at the CNQ.

From a legal perspective, Otis J.A. ruled that the CBC had not committed any fault. The public's right

d'honoraires extrajudiciaires ou de dépens sur la base avocat-client. Il ajoute qu'en raison de l'ensemble des circonstances et, plus particulièrement, des dommages-intérêts très élevés et généreux accordés à d'autres égards par le juge de première instance, il réduirait à 15 000 \$ le montant des dommages-intérêts punitifs que la SRC et la CNQ devraient respectivement payer à M. Néron uniquement.

(2) La dissidence de la juge Otis

La juge Otis souscrit à l'évaluation des dommages de la juge Mailhot, sauf qu'elle ordonnerait à la CNQ de payer des dépens sur la base avocat-client. Toutefois, elle estime que la SRC et ses journalistes n'ont commis aucune faute à l'égard de M. Néron et de GEN Communication. Elle note la conclusion du juge de première instance selon laquelle « [l]es deux erreurs que Néron a pu commettre sans le vouloir émanaient de la CNQ, qui véhiculait des rumeurs non fondées » (par. 323). Elle insiste également sur le fait que, pendant les mois qui ont suivi le reportage du 12 janvier, l'Office des professions du Québec est intervenu pour exiger l'établissement d'un plan de redressement par la CNQ, à défaut de quoi il pourrait la mettre en tutelle administrative afin d'assurer, comme il se doit, la protection du public. Le comité formé pour étudier les problèmes de la CNQ a produit son rapport en novembre 1995. Après l'avoir examiné, le juge de première instance a souligné que « [c]e rapport est particulièrement critique à l'égard de la présidence, de la direction générale et du bureau du syndic. Il recommande tout un train de mesures qui dénotent une situation interne déplorable » (par. 326). De surcroît, pendant à peu près la même période, la présidente, le directeur général ainsi que le syndic ont tous présenté leur démission. Les deux notaires mentionnés dans les reportages ont été radiés l'un à vie et l'autre pour une période de 32 ans. Bref, la juge Otis choisit de souligner les effets positifs que le reportage du 12 janvier peut avoir eu pour ce qui est d'assurer la protection du public et de faire bouger les choses à la CNQ.

Sur le plan juridique, la juge Otis conclut à l'absence de faute de la part de la SRC. Le droit du

to information is embodied in freedom of expression and freedom of the press. She stated that such fundamental liberties are essential to our democratic institutions. They are the foundation for the dissemination of ideas, opinion and knowledge, inspiring critical thinking and ensuring that the moral and intellectual character of our political and social stakeholders is put to the test.

42 Otis J.A. ruled that the December 18th letter could not receive privacy protection under s. 5 of the Quebec *Charter* and arts. 35 and 36 C.C.Q. It could not be said that the information communicated was confidential, or that the author of the information viewed it as essentially a private exchange.

43 Otis J.A. further held that the trial judge erred in denying the CBC the right to broadcast information that was true and in the public interest. In her opinion, this error stemmed from the trial judge's earlier error of characterizing the letter as a private letter. It was in the public's interest to know that the CNQ was circulating false information about the complainants, who were people the CNQ had a legal mission to protect. The essence of the January 12th report was not to tarnish the reputation of the CNQ's agent, Mr. Néron, but to alert public opinion.

44 Nor was it a civil fault that not all elements of the letter were revealed. The letter was not private, or protected by confidentiality. Otis J.A. then stated, at para. 356:

[TRANSLATION] It would certainly have been desirable, in keeping with journalistic standards, to cover all aspects of the letter in the report. However, this lack of fairness does not constitute civil fault. Neither the nature nor the purpose of the report would have changed in any way had the public known that the CNQ was unhappy (1) that the December 15, 1994 broadcast of the first report was repeatedly advertised in advance, (2) that viewers may have been left with the impression that the chairman of the Office des professions was going to ask that the CNQ be placed under trusteeship, or (3) that an inappropriate reference had been made to the *notary Potiron*. None of these three minor points would have justified

public à l'information fait partie de la liberté d'expression et de la liberté de presse. Elle estime que ces libertés fondamentales sont essentielles à nos institutions démocratiques. Elles servent d'assise à la diffusion des idées, des opinions et du savoir, inspirant la pensée critique et révélant la qualité du jugement moral et intellectuel des acteurs de la vie politique et sociale.

Selon la juge Otis, la lettre du 18 décembre ne peut pas bénéficier de la protection de la vie privée prévue à l'art. 5 de la *Charte* québécoise ainsi qu'aux art. 35 et 36 C.c.Q. On ne peut pas soutenir que l'information communiquée était confidentielle ou que l'auteur de cette communication la considérait comme un échange essentiellement privé.

En outre, d'après la juge Otis, le juge de première instance a commis une erreur en refusant à la SRC le droit de diffuser une information véridique et d'intérêt public. À son avis, cette erreur découlait de celle que le juge de première instance avait commise antérieurement en qualifiant la lettre de missive privée. Il était dans l'intérêt de la population de savoir que la CNQ propageait de fausses informations sur les plaignants qu'elle avait pourtant pour mission légale de protéger. Le reportage du 12 janvier avait essentiellement pour objet d'alerter l'opinion publique et non pas de ternir la réputation du mandataire de la CNQ, M. Néron.

La non-divulgence de tous les éléments de la lettre ne constituait pas non plus une faute civile. La lettre ne revêtait aucun caractère privé et n'était protégée par aucune entente de confidentialité. La juge Otis affirme ceci, au par. 356 :

Il aurait certes été souhaitable, dans le respect des normes journalistiques, que tous les éléments de la lettre soient traités dans le reportage. Toutefois, ce manquement à l'équité ne constitue pas une faute civile. Que le public ait su que la CNQ était mécontente 1) que l'on ait annoncé, à l'avance et de manière répétitive, la diffusion du premier reportage du 15 décembre 1994, 2) que l'on ait pu avoir l'impression que le président de l'Office des professions allait demander la mise en tutelle de la CNQ ou 3) qu'il était déplacé de référer au *notaire Potiron* n'aurait rien changé à la nature et au but du reportage. Aucun de ces trois éléments mineurs n'aurait justifié la mise au point du 12 janvier 1995. En fait, la CNQ et

the January 12, 1995 update. The complaint of the CNQ and Gilles E. Néron is that the CBC did not allow them to retract their erroneous statements gracefully. In fact, the public interest made it imperative that this conduct be brought to light in order to contribute to the CBC's mission to keep the public informed. [Emphasis in original.]

For these reasons, Otis J.A. concluded that the CBC was not at fault for the broadcast of the December 18, 1994 letter.

C. *The Granting of Leave to Appeal to This Court*

On June 19, 2003, the CBC was granted leave to appeal to this Court. The CNQ chose not to appeal from the decision against it by the Quebec Court of Appeal. Consequently, the CNQ has already paid the sum of \$783,153 in compensatory damages and \$100,000 in exemplary damages, plus interest and an additional indemnity. The CBC, given the condemnation *in solidum*, has also paid the CNQ the portion of the damages imputed to it, as well as \$15,000 in exemplary damages to Mr. Néron, all with interest and an additional indemnity.

IV. Relevant Legislative Provisions

Civil Code of Québec, S.Q. 1991, c. 64

3. Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy.

These rights are inalienable.

35. Every person has a right to the respect of his reputation and privacy.

No one may invade the privacy of a person without the consent of the person or his heirs unless authorized by law.

36. The following acts, in particular, may be considered as invasions of the privacy of a person:

- (1) entering or taking anything in his dwelling;
- (2) intentionally intercepting or using his private communications;
- (3) appropriating or using his image or voice while he is in private premises;

Gilles E. Néron reprochent à la SRC de ne pas leur avoir permis de soustraire leurs propos erronés avec élégance. L'intérêt public commandait justement qu'un tel comportement soit mis en évidence afin de servir la mission d'information publique. [En italique dans l'original.]

Pour ces motifs, la juge Otis conclut que la SRC n'a commis aucune faute en diffusant la lettre du 18 décembre 1994.

C. *L'autorisation de pourvoi devant notre Cour*

Le 19 juin 2003, l'appelante la SRC obtient l'autorisation de se pourvoir devant notre Cour. La CNQ a choisi de ne pas appeler de la décision rendue contre elle par la Cour d'appel du Québec. En conséquence, la CNQ a déjà versé les sommes de 783 153 \$ à titre de dommages-intérêts compensatoires et de 100 000 \$ à titre de dommages-intérêts exemplaires, plus les intérêts et une indemnité additionnelle. À la suite de la déclaration de responsabilité *in solidum*, l'appelante la SRC a également payé à la CNQ la partie des dommages qu'on lui avait imputée et, à M. Néron, la somme de 15 000 \$ à titre de dommages-intérêts exemplaires, le tout avec intérêts et indemnité additionnelle.

IV. Dispositions législatives pertinentes

Code civil du Québec, L.Q. 1991, ch. 64

3. Toute personne est titulaire de droits de la personnalité, tels le droit à la vie, à l'inviolabilité et à l'intégrité de sa personne, au respect de son nom, de sa réputation et de sa vie privée.

Ces droits sont incessibles.

35. Toute personne a droit au respect de sa réputation et de sa vie privée.

Nulle atteinte ne peut être portée à la vie privée d'une personne sans que celle-ci ou ses héritiers y consentent ou sans que la loi l'autorise.

36. Peuvent être notamment considérés comme des atteintes à la vie privée d'une personne les actes suivants :

- 1° Pénétrer chez elle ou y prendre quoi que ce soit;
- 2° Intercepter ou utiliser volontairement une communication privée;
- 3° Capter ou utiliser son image ou sa voix lorsqu'elle se trouve dans des lieux privés;

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(4) keeping his private life under observation by any means;

(5) using his name, image, likeness or voice for a purpose other than the legitimate information of the public;

(6) using his correspondence, manuscripts or other personal documents.

1457. Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.

He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.

1478. Where an injury has been caused by several persons, liability is shared by them in proportion to the seriousness of the fault of each.

The victim is included in the apportionment when the injury is partly the effect of his own fault.

1525. Solidarity between debtors is not presumed; it exists only where it is expressly stipulated by the parties or imposed by law.

Solidarity between debtors is presumed, however, where an obligation is contracted for the service or carrying on of an enterprise.

The carrying on by one or more persons of an organized economic activity, whether or not it is commercial in nature, consisting of producing, administering or alienating property, or providing a service, constitutes the carrying on of an enterprise.

Charter of Human Rights and Freedoms, R.S.Q., c. C-12

3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

4. Every person has a right to the safeguard of his dignity, honour and reputation.

5. Every person has a right to respect for his private life.

4° Surveiller sa vie privée par quelque moyen que ce soit;

5° Utiliser son nom, son image, sa ressemblance ou sa voix à toute autre fin que l'information légitime du public;

6° Utiliser sa correspondance, ses manuscrits ou ses autres documents personnels.

1457. Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui.

Elle est, lorsqu'elle est douée de raison et qu'elle manque à ce devoir, responsable du préjudice qu'elle cause par cette faute à autrui et tenue de réparer ce préjudice, qu'il soit corporel, moral ou matériel.

Elle est aussi tenue, en certains cas, de réparer le préjudice causé à autrui par le fait ou la faute d'une autre personne ou par le fait des biens qu'elle a sous sa garde.

1478. Lorsque le préjudice est causé par plusieurs personnes, la responsabilité se partage entre elles en proportion de la gravité de leur faute respective.

La faute de la victime, commune dans ses effets avec celle de l'auteur, entraîne également un tel partage.

1525. La solidarité entre les débiteurs ne se présume pas; elle n'existe que lorsqu'elle est expressément stipulée par les parties ou prévue par la loi.

Elle est, au contraire, présumée entre les débiteurs d'une obligation contractée pour le service ou l'exploitation d'une entreprise.

Constitue l'exploitation d'une entreprise l'exercice, par une ou plusieurs personnes, d'une activité économique organisée, qu'elle soit ou non à caractère commercial, consistant dans la production ou la réalisation de biens, leur administration ou leur aliénation, ou dans la prestation de services.

Charte des droits et libertés de la personne, L.R.Q., ch. C-12

3. Toute personne est titulaire des libertés fondamentales telles la liberté de conscience, la liberté de religion, la liberté d'opinion, la liberté d'expression, la liberté de réunion pacifique et la liberté d'association.

4. Toute personne a droit à la sauvegarde de sa dignité, de son honneur et de sa réputation.

5. Toute personne a droit au respect de sa vie privée.

Canadian Charter of Rights and Freedoms

2. Everyone has the following fundamental freedoms:

. . .

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

V. AnalysisA. *Statement of Issues and Positions of the Parties*

The legal issue is whether the CBC committed a fault giving rise to civil liability. The CBC argues that it is not at fault. The broadcast of January 12, 1995 was legitimate given the public's right to be informed and the right to freedom of expression with respect to issues of public interest. The trial judge was wrong in his characterization of the facts. He and the majority of the Quebec Court of Appeal further erred in holding the CNQ and the CBC liable *in solidum*. The respondents Néron and GEN Communication, on the other hand, argue that the CBC committed a grave and intentional fault, going so far as to indicate malice. The finding of liability in the courts below was justified. The respondents are asking that costs be awarded on a solicitor-client basis.

B. *The Importance of Freedom of the Press*

It is beyond doubt that freedom of expression, and its corollary freedom of the press, play an essential and invaluable role in our society. These fundamental freedoms are protected by s. 3 of the Quebec Charter and s. 2(b) of the *Canadian Charter of Rights and Freedoms*. In fact, freedom of expression was protected even before the Quebec and Canadian Charters. Consider the following comment from McIntyre J. in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 583:

Charte canadienne des droits et libertés

2. Chacun a les libertés fondamentales suivantes :

. . .

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

V. AnalyseA. *Exposé des questions en litige et des positions des parties*

La question de droit en jeu consiste à déterminer si la SRC a commis une faute génératrice de responsabilité civile. La SRC soutient n'avoir commis aucune faute. Le reportage du 12 janvier 1995 était légitime compte tenu du droit du public à l'information et du droit à la liberté d'expression concernant les questions d'intérêt public. La qualification des faits par le juge de première instance est erronée. Lui et les juges majoritaires de la Cour d'appel du Québec ont commis une autre erreur en concluant à la responsabilité *in solidum* de la CNQ et de la SRC. De leur côté, les intimés M. Néron et GEN Communication font valoir que la faute de la SRC est grave et intentionnelle au point de donner une impression de malveillance. Les tribunaux d'instance inférieure étaient justifiés de conclure à la responsabilité. Les intimés réclament des dépens sur la base avocat-client.

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B. *L'importance de la liberté de presse*

Il ne fait aucun doute que la liberté d'expression et son corollaire, la liberté de presse, jouent un rôle essentiel et inestimable dans notre société. Ces libertés fondamentales sont garanties par l'art. 3 de la Charte québécoise et par l'al. 2b) de la *Charte canadienne des droits et libertés*. En fait, la liberté d'expression était garantie même avant l'adoption des Chartes québécoise et canadienne. Rappelons-nous le commentaire suivant du juge McIntyre dans l'arrêt *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573, p. 583 :

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Freedom of expression is not, however, a creature of the *Charter*. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.

49 The importance of freedom of expression and freedom of the press has been affirmed by this Court on numerous other occasions. Cory J. wrote in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1336:

It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the *Charter* set forth s. 2(b) in absolute terms which distinguishes it, for example, from s. 8 of the *Charter* which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances.

50 On the same note, Cory J. made the following comment in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459, at p. 475:

The media have a vitally important role to play in a democratic society. It is the media that, by gathering and disseminating news, enable members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being.

51 This Court spoke of the importance of freedom of expression quite recently in *Prud'homme v. Prud'homme*, [2002] 4 S.C.R. 663, 2002 SCC 85. The Court's comments in that case are of particular relevance to the case at bar because the context was

La liberté d'expression n'est toutefois pas une création de la *Charte*. Elle constitue l'un des concepts fondamentaux sur lesquels repose le développement historique des institutions politiques, sociales et éducatives de la société occidentale. La démocratie représentative dans sa forme actuelle, qui est en grande partie le fruit de la liberté d'exprimer des idées divergentes et d'en discuter, dépend pour son existence de la préservation et de la protection de cette liberté.

Notre Cour a confirmé, à de nombreuses autres occasions, l'importance de la liberté d'expression et de la liberté de presse. Le juge Cory écrivait à ce propos dans l'arrêt *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, p. 1336 :

Il est difficile d'imaginer une liberté garantie qui soit plus importante que la liberté d'expression dans une société démocratique. En effet, il ne peut y avoir de démocratie sans la liberté d'exprimer de nouvelles idées et des opinions sur le fonctionnement des institutions publiques. La notion d'expression libre et sans entraves est omniprésente dans les sociétés et les institutions vraiment démocratiques. On ne peut trop insister sur l'importance primordiale de cette notion. C'est sans aucun doute la raison pour laquelle les auteurs de la *Charte* ont rédigé l'al. 2b) en termes absolus, ce qui le distingue, par exemple, de l'art. 8 de la *Charte* qui garantit le droit plus relatif à la protection contre les fouilles et perquisitions abusives. Il semblerait alors que les libertés consacrées par l'al. 2b) de la *Charte* ne devraient être restreintes que dans les cas les plus clairs.

Dans le même ordre d'idées, le juge Cory a fait le commentaire suivant dans l'arrêt *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1991] 3 R.C.S. 459, p. 475 :

Les médias ont un rôle primordial à jouer dans une société démocratique. Ce sont les médias qui, en réunissant et en diffusant les informations, permettent aux membres de notre société de se former une opinion éclairée sur les questions susceptibles d'avoir un effet important sur leur vie et leur bien-être.

D'ailleurs, notre Cour a tout récemment souligné l'importance de la liberté d'expression dans l'arrêt *Prud'homme c. Prud'homme*, [2002] 4 R.C.S. 663, 2002 CSC 85. Les observations de la Cour dans cette affaire sont particulièrement pertinentes en

one of defamation. At para. 38, L'Heureux-Dubé J. and myself stated that:

... it is important to note that an action in defamation involves two fundamental values: freedom of expression and the right to reputation. This Court has long recognized the importance of the first of those values in a democratic society.

C. *The Importance of the Right to Respect for One's Reputation*

Despite its undoubted importance, freedom of expression is not absolute. As this Court noted in *Prud'homme*, *supra*, at para. 43, freedom of expression can be limited by the requirements imposed by other people's right to the protection of their reputation. Cory J. observed in *Hill*, *supra*, at para. 108, that reputation, as an aspect of personality, is equally worthy of protection in a democratic society concerned about respect for the individual:

Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited. [Emphasis added.]

The right to reputation also receives protection in Quebec under s. 4 of the Quebec *Charter*, and under art. 3 C.C.Q. This Court further stated in *Prud'homme*, *supra*, at para. 44, that "although it is not specifically mentioned in the *Canadian Charter*, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Canadian Charter* rights (*Hill*, *supra*, at para. 120)".

D. *The Importance of Finding an Equilibrium Between the Two Rights in the Law of Civil Liability for Defamation*

In *Prud'homme*, *supra*, at para. 38, I stated, along with my then-colleague L'Heureux-Dubé J.,

l'espèce puisqu'elles ont été faites dans le contexte d'une action pour diffamation. Au paragraphe 38, la juge L'Heureux-Dubé et moi-même affirmions ceci :

... il importe de rappeler que le recours en diffamation met en jeu deux valeurs fondamentales, soit la liberté d'expression et le droit à la réputation. Notre Cour a reconnu très tôt l'importance de la première de ces valeurs dans une société démocratique.

C. *L'importance du droit à la sauvegarde de la réputation*

Malgré son importance indéniable, la liberté d'expression n'est pas absolue. Comme notre Cour l'a fait remarquer dans l'arrêt *Prud'homme*, précité, par. 43, la liberté d'expression peut être limitée par les exigences du droit d'autrui à la protection de sa réputation. Dans l'arrêt *Hill*, précité, par. 108, le juge Cory souligne qu'en tant que facette de la personnalité la réputation a droit à la même protection dans une société démocratique soucieuse de respecter la personne :

Les démocraties ont toujours reconnu et révéral'importance fondamentale de la personne. Cette importance doit, à son tour, reposer sur la bonne réputation. Cette bonne réputation, qui rehausse le sens de valeur et de dignité d'une personne, peut également être très rapidement et complètement détruite par de fausses allégations. Et une réputation ternie par le libelle peut rarement regagner son lustre passé. Une société démocratique a donc intérêt à s'assurer que ses membres puissent jouir d'une bonne réputation et la protéger aussi longtemps qu'ils en sont dignes. [Je souligne.]

Au Québec, le droit à la sauvegarde de la réputation est également protégé par l'art. 4 de la *Charte québécoise* et l'art. 3 C.c.Q. Dans l'arrêt *Prud'homme*, précité, par. 44, notre Cour a ajouté que « bien que la réputation de l'individu ne soit pas expressément mentionnée dans la *Charte canadienne*, elle participe de sa dignité, concept qui sous-tend tous les droits garantis par la *Charte canadienne* (*Hill*, précité, par. 120) ».

D. *L'importance d'établir l'équilibre entre les deux droits en matière de responsabilité civile pour diffamation*

Dans l'arrêt *Prud'homme*, précité, par. 38, la juge L'Heureux-Dubé, qui était ma collègue à l'époque,

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that determining fault in a defamation case “is a contextual question of fact and circumstances”. In an action in defamation the two fundamental values of freedom of expression and the right to respect for one’s reputation must be weighed against each other to find the necessary equilibrium or, as I put it in the judgment of the Quebec Court of Appeal in *Radio Sept-Îles*, *supra*, at p. 1818:

et moi-même avons affirmé que l’appréciation de la faute en matière de diffamation « demeure une question contextuelle de faits et de circonstances ». Pour établir l’équilibre nécessaire dans le cadre d’une action pour diffamation, il faut soupeser, l’une en fonction de l’autre, les deux valeurs fondamentales que sont la liberté d’expression et le droit à la sauvegarde de la réputation, ou, comme je l’affirmais dans l’arrêt de la Cour d’appel du Québec *Radio Sept-Îles*, précité, p. 1818 :

[TRANSLATION] This area of the law of civil liability also requires a particular sensitivity to values that at times conflict with each other, such as the public’s right to information and the freedom of the media to disseminate it, on the one hand, and, on the other, the right to respect for one’s private life and the protection of some of its core components, namely anonymity and privacy.

Ce domaine du droit de la responsabilité civile demande, par ailleurs, une sensibilité particulière à des valeurs parfois en opposition comme, d’une part, le droit du public à l’information et à la liberté des médias de la diffuser et, d’autre part, le droit à la vie privée et à la protection de certaines de ses composantes essentielles, l’anonymat et l’intimité.

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In *Prud’homme*, the balance to be struck was that between the need for free and open speech in municipal democracy on the one hand, and the right of those impugned by the municipal councillor’s statements to respect for their reputations on the other. Similarly, a balance had to be struck in *Radio Sept-Îles*, between the right to broadcast information that was true and in the public interest on the one hand, and the right of those mentioned in the broadcast to respect for their reputations on the other. In *Radio Sept-Îles*, as in the case at bar, I noted that even where the information being broadcast is true, it is still not certain that civil liability is precluded. It is all the more important in such circumstances — where the information being broadcast is true, but could still potentially attract delictual liability — to strike the correct balance. I made the following comment at p. 1821: [TRANSLATION] “[t]he right to information sometimes clashes here with the right to respect for one’s private life, and in particular with its basic components of anonymity and the privacy of the individual.” I went on to note that it might be appropriate to consider whether the information is in the public interest when assessing the facts and circumstances and determining whether there is fault. This case, however, highlights a different circumstance, one where the information broadcast may have been true — at least in part (to be discussed below) — and it may have been in the public interest to broadcast it, but the whole of the

Dans l’arrêt *Prud’homme*, il fallait établir l’équilibre entre la nécessité de s’exprimer librement et ouvertement dans une démocratie municipale, d’une part, et le droit à la sauvegarde de la réputation des personnes attaquées par le conseiller municipal, d’autre part. De même, dans l’arrêt *Radio Sept-Îles*, on devait établir un équilibre entre le droit de diffuser une information véridique et d’intérêt public, d’une part, et le droit à la sauvegarde de la réputation des personnes mentionnées dans le reportage, d’autre part. Dans cet arrêt, comme en l’espèce, j’ai souligné que, même si l’information diffusée est véridique, il n’est pas assuré que la responsabilité civile ne sera pas engagée. Il est d’autant plus important, en pareilles circonstances — lorsque l’information diffusée est véridique, mais est tout de même susceptible d’engager la responsabilité civile délictuelle —, d’atteindre le juste équilibre. À la page 1821 de l’arrêt *Radio Sept-Îles*, j’ai ajouté que « [l]e droit à l’information se heurte parfois ici au droit à la vie privée, et particulièrement dans ses constituantes fondamentales que sont l’anonymat et l’intimité de chaque individu. » J’ai également affirmé qu’il pourrait convenir de se demander si l’information est d’intérêt public lorsqu’il s’agit d’apprécier les faits et les circonstances et de déterminer si une faute a été commise. Cependant, la présente affaire met en relief une situation différente, dans laquelle il se peut que l’information diffusée ait été véridique — du moins en partie, comme nous

broadcast quite simply did not measure up to professional standards. In such a case, fault can still exist. I turn now to an analysis of the law of defamation, and of the establishment of fault under art. 1457 C.C.Q.

E. *Jurisprudential Principles — The Prud’homme and Radio Sept-Îles Judgments*

This Court recently tackled the Quebec law of civil liability for defamation in *Prud’homme*. The Court began its analysis of the civil law rules of liability in this domain by noting that Quebec civil law does not provide for a specific form of action for interference with one’s reputation. An action in defamation is grounded in art. 1457 C.C.Q. Like any other action in civil, delictual and quasi-delictual liability, the plaintiff must establish, on a balance of probabilities, the existence of injury, a wrongful act and a causal connection between the two. The starting point is not the common law but the *Civil Code of Quebec*, which is the basic general law in Quebec, as provided for in the preliminary provision of the *Civil Code*. Courts should avoid needlessly importing or applying common law rules in a matter which, subject to the principles of Charter law, is governed by the procedure, methods and principles of the civil law. This point was made, in the context of the law of defamation, by J.-L. Baudouin and P. Deslauriers in *La responsabilité civile* (6th ed. 2003), at p. 193:

[TRANSLATION] It can be seen from the leading cases how often the Quebec courts have, when dealing with defamation and verbal abuse, borrowed from common law concepts (good faith and justification, qualified privilege), from decisions of English or Canadian courts or from common law commentators, such as *Odgers*. Borrowing from the common law in this manner is totally unnecessary and unwarranted . . . and it has the effect of greatly complicating a subject that, when examined in light of the Civil Code and the general principles of civil law, has the merit of being relatively straightforward.

le verrons plus loin — et qu’il ait été dans l’intérêt public de la diffuser, mais où, dans l’ensemble, le reportage diffusé ne respecte tout simplement pas les normes professionnelles. Dans ce cas, il peut quand même y avoir faute. Je passe maintenant à l’analyse du droit applicable en matière de diffamation et à la question de la démonstration d’une faute au sens de l’art. 1457 C.c.Q.

E. *Principes jurisprudentiels — les arrêts Prud’homme et Radio Sept-Îles*

Notre Cour a récemment étudié, dans l’arrêt *Prud’homme*, le contenu du droit québécois en matière de responsabilité civile pour diffamation. La Cour a commencé son analyse du régime de responsabilité civile à cet égard en faisant remarquer que le droit civil québécois ne prévoit pas de recours particulier pour l’atteinte à la réputation. L’action pour diffamation repose sur l’art. 1457 C.c.Q. Comme pour toute autre action en responsabilité civile, délictuelle ou quasi délictuelle, le demandeur doit établir, selon la prépondérance des probabilités, l’existence d’un préjudice, d’une faute et d’un lien de causalité entre les deux. Le point de départ est non pas la common law, mais le *Code civil du Québec* qui représente la loi fondamentale générale du Québec, comme le prévoit sa disposition préliminaire. Les tribunaux doivent éviter d’introduire ou d’appliquer inutilement des règles de common law dans une matière qui, sous réserve des principes du droit des chartes, reste régi par la procédure, les méthodes et les principes du droit civil. Dans leur traité intitulé *La responsabilité civile* (6^e éd. 2003), p. 193, J.-L. Baudouin et P. Deslauriers font d’ailleurs cette remarque dans le contexte du droit applicable en matière de diffamation :

La lecture des principaux arrêts montre combien parfois les tribunaux québécois, en matière de diffamation et d’injures, ont souvent fait appel soit à des notions de common law (*good faith and justification, qualified privilege*), soit à des décisions de cours anglaises ou canadiennes, soit à des auteurs de common law, tel *Odgers*. Ce recours à la common law est strictement inutile et totalement injustifié [. . .] et a pour effet de singulièrement compliquer une matière qui, examinée à la lumière du Code civil et des principes généraux du droit civil, a le mérite de rester relativement simple.

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The existence of an injury is not at issue in this appeal, but suffice it to say that in order to prove injury the plaintiff must convince the judge that the impugned remarks were defamatory. As noted in *Prud'homme, supra*, at para. 34, this involves asking “whether an ordinary person would believe that the remarks made, when viewed as a whole, brought discredit on the reputation of another person”. The CBC does not argue that Mr. Néron’s reputation was not defamed and that he did not suffer injury as a result of the January 12th broadcast.

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Nor is the causal connection portion of the art. 1457 test for liability seriously at issue in this case. I shall discuss this further below, when I deal with the solidarity issue, but the causal link between the January 12th broadcast and all that subsequently befell Mr. Néron has not been effectively challenged by the CBC. The thrust of the CBC’s argument is instead the absence of fault, as determined in an action in defamation in Quebec.

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The determination of fault in an action in defamation involves a contextual analysis of the facts and circumstances. As noted in *Prud'homme, supra*, at para. 83, “it is important to note that the respondents’ statement must be considered in context and in its entirety. The general impression that it conveys must govern in determining whether a fault was committed” (emphasis added). Thus, it is insufficient for the determination of fault to focus merely on the veracity of the content of the January 12th report. One must look globally at the tenor of the broadcast, the way it was conducted and the context surrounding it.

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This is not to say that it is irrelevant that the defamatory remarks are true, nor is it irrelevant that they were made in the public interest. Truth and public interest are merely factors to consider in the overall contextual analysis of fault in an action in defamation under the *Civil Code of Québec*. Truth and public interest are relevant pieces of the puzzle, but are still only pieces of the puzzle and not

L’existence d’un préjudice n’est pas en cause dans le présent pourvoi, mais il suffit de rappeler que, pour faire la preuve d’un préjudice, le demandeur doit convaincre le juge que les propos litigieux sont diffamatoires. Comme l’a fait observer notre Cour dans l’arrêt *Prud'homme*, précité, par. 34, cela signifie qu’il faut se demander « si un citoyen ordinaire estimerait que les propos tenus, pris dans leur ensemble, ont déconsidéré la réputation d’un tiers ». L’appelante ne nie pas que la réputation de M. Néron a été ternie et que ce dernier a subi un préjudice à la suite du reportage du 12 janvier.

Le volet « lien de causalité » du critère de responsabilité prévu à l’art. 1457 n’est pas non plus vraiment en cause en l’espèce. J’analyserai ce point plus loin au moment d’examiner la question de la solidarité, mais, en réalité, l’appelante n’a pas contesté l’existence d’un lien causal entre le reportage du 12 janvier et tout ce qui est arrivé, par la suite, à M. Néron. Dans son argumentation, l’appelante invoque essentiellement l’absence de faute, dont l’existence doit être établie dans une action pour diffamation au Québec.

Dans une action pour diffamation, il faut procéder à une analyse contextuelle des faits et des circonstances pour déterminer si une faute a été commise. Comme l’indique l’arrêt *Prud'homme*, précité, par. 83, « il importe de souligner que la déclaration de l’intimé doit être considérée dans son contexte et dans son ensemble. L’impression générale qui s’en dégage doit guider l’appréciation de l’existence d’une faute » (je souligne). Donc, pour déterminer si une faute a été commise, il ne suffit pas de mettre l’accent sur la véracité du contenu du reportage diffusé le 12 janvier. Il faut examiner globalement la teneur du reportage, sa méthodologie et son contexte.

Cela ne signifie pas qu’il est sans importance que les propos diffamatoires soient véridiques ou d’intérêt public. La véracité et l’intérêt public ne sont toutefois que des facteurs dont il faut tenir compte en procédant à l’analyse contextuelle globale de la faute dans une action pour diffamation intentée sous le régime du *Code civil du Québec*. Ils ne représentent que des éléments pertinents de l’ensemble du

necessarily the determinative factors, as can be seen in the comments of this Court, at para. 37 of *Prud'homme, supra*:

... in Quebec civil law, communicating false information is not necessarily a wrongful act. On the other hand, conveying true information may sometimes be a wrongful act. This is an important difference between the civil law and the common law, in which the falsity of the things said is an element of the tort of defamation. However, even in the civil law, the truth of what is said may be a way of proving that no wrongful act was committed, in circumstances in which the public interest is in issue.

The determinative factor, or guiding principle, of liability for defamation is to be found in the Quebec Court of Appeal decision in *Radio Sept-Îles, supra*. For journalists and the media, there will not be fault until it has been shown that the journalist or media outlet in question has fallen below professional standards. As Baudouin and Deslauriers note in their text, at p. 207:

[TRANSLATION] *Compliance with journalistic standards* — Journalists who are subject to liability comparable to that of professionals must comply with the standards of the profession and attempt, to the extent possible, to disseminate accurate and complete information resulting from a serious investigation.

Thus, I added the following at p. 1820 of *Radio Sept-Îles*:

[TRANSLATION] The liability at issue here is much more like professional liability. The function of the media is to gather, process and disseminate information. Their role also includes commentary and interpretation. When gathering information, the media's liability seems to be essentially professional in nature and to be based on a test of fault. This of course requires that the courts apply the test of the reasonable person working in the news sector. . . .

. . . .

Fault cannot be reduced to the mere publication of false information. Rather, it is linked to the failure to discharge an obligation of diligence or means, as frequently

casse-tête et ne jouent pas nécessairement le rôle d'un facteur déterminant en toutes circonstances, comme l'indiquent les commentaires formulés par notre Cour, au par. 37 de l'arrêt *Prud'homme*, précité :

... en droit civil québécois, la communication d'une information fausse n'est pas nécessairement fautive. À l'inverse, la transmission d'une information véridique peut parfois constituer une faute. On retrouve là une importante différence entre le droit civil et la common law où la fausseté des propos participe du délit de diffamation (*tort of defamation*). Toutefois, même en droit civil, la véracité des propos peut constituer un moyen de prouver l'absence de faute dans des circonstances où l'intérêt public est en jeu.

Dans l'arrêt *Radio Sept-Îles*, précité, la Cour d'appel du Québec identifie le facteur déterminant ou principe directeur en matière de responsabilité pour diffamation. Les journalistes et les médias n'auront commis une faute que s'il est démontré qu'ils n'ont pas respecté les normes professionnelles. Comme le soulignent Baudouin et Deslauriers, à la p. 207 de leur ouvrage :

Respect des normes journalistiques — Les journalistes qui sont soumis à une responsabilité assimilable à celle des professionnels doivent respecter les standards de la profession et tenter, dans la mesure du possible, de transmettre une information exacte et complète, fruit d'une enquête sérieuse.

J'ai ajouté ce commentaire sur la question, à la p. 1820 de l'arrêt *Radio Sept-Îles* :

On se trouve beaucoup plus devant une responsabilité assimilable à la responsabilité professionnelle. Les médias ont pour fonction de rechercher, de traiter et de communiquer l'information. Ils ont aussi vocation à la commenter et à l'interpréter. Dans leur activité de recherche de l'information, leur responsabilité paraît essentiellement une responsabilité d'ordre professionnel, basée sur un critère de faute. Celui-ci fait certes appel au critère de la personne raisonnable, mais œuvrant dans ce secteur de l'information. . . .

. . . .

La faute ne se réduit pas à la seule publication d'une information erronée. Elle se rattache à l'inexécution d'une obligation de diligence ou de moyen, comme cela

occurs in cases of professional liability. [Emphasis added.]

In sum, the existence of a fault is the general and fundamental requirement in the law of defamation and fault is measured against professional journalistic standards. A journalist is not held to a standard of absolute perfection; he or she has an obligation of means. On the one hand, if a journalist disseminates erroneous information, this will not be determinative of fault. On the other hand, a journalist will not necessarily be exonerated simply because the information he or she disseminated is true and in the public interest. If, for other reasons, the journalist has fallen below the standard of the reasonable journalist, it is still open to the courts to find fault. Viewed this way, civil liability for defamation continues to fit nicely within the general framework of art. 1457 C.C.Q.

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As such, the conduct of the reasonable journalist becomes the all important guidepost. It is the tool which allows us to assess what conduct is reasonable within the context of art. 1457 C.C.Q. It is the ultimate standard against which fault is determined, and the framework through which other important considerations such as truth, falsity and the public interest are filtered. The question to be answered in this case thus becomes whether *Le Point's* journalists lived up to the professional standards of a reasonable journalist when they broadcast the January 12th report.

F. *The Element of Fault in This Case*

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It is my conclusion that the courts below, in holding the CBC liable for defamation, achieved the correct balance between freedom of expression and Mr. Néron's right to respect for his reputation. For several reasons, I find serious fault in the manner in which the CBC prepared for and broadcast the January 12th report. I make this finding even though Mr. Néron's handwritten letter cannot be considered private. Taking into consideration all the factors discussed below, it is my conclusion

arrive fréquemment en responsabilité professionnelle. [Je souligne.]

Somme toute, l'existence d'une faute constitue l'exigence de base du droit de la responsabilité civile pour diffamation et cette faute doit être appréciée en fonction des normes journalistiques professionnelles. Les journalistes ne sont pas tenus à un critère de perfection absolue; ils sont astreints à une obligation de moyens. D'une part, le fait qu'un journaliste diffuse des renseignements erronés n'est pas déterminant en matière de faute. D'autre part, un journaliste ne sera pas nécessairement exonéré de toute responsabilité simplement parce que l'information diffusée est véridique et d'intérêt public. Si, pour d'autres raisons, le journaliste n'a pas respecté la norme du journaliste raisonnable, les tribunaux pourront toujours conclure à l'existence d'une faute. Vue sous cet angle, la responsabilité civile pour diffamation continue de s'inscrire parfaitement dans le cadre général de l'art. 1457 C.c.Q.

La conduite du journaliste raisonnable devient donc une balise de la plus haute importance. En effet, elle est l'outil qui nous permet d'évaluer la nature d'une conduite raisonnable dans le contexte de l'art. 1457 C.c.Q. Elle représente la norme par excellence à l'aune de laquelle on détermine si une faute a été commise et le cadre de référence servant à passer au crible d'autres éléments importants à prendre en considération, tels la véracité, la fausseté et l'intérêt public. Il faut donc rechercher en l'espèce si les journalistes du *Point* ont respecté les normes professionnelles du journaliste raisonnable dans leur reportage du 12 janvier.

F. *L'élément de faute en l'espèce*

Je considère qu'en tenant la SRC responsable de diffamation les tribunaux d'instance inférieure ont atteint un juste équilibre entre la liberté d'expression et le droit de M. Néron à la sauvegarde de sa réputation. Plusieurs raisons m'incitent à conclure que la SRC a commis une faute grave dans sa façon de préparer et de diffuser le reportage du 12 janvier. J'arrive à cette conclusion même si la lettre manuscrite de M. Néron ne peut pas être qualifiée de privée. Compte tenu de tous les facteurs

that the January 12th report falls short of the professional standards of the reasonable journalist.

(1) The Broadcast Contained Incomplete Information About the Content of the Letter

In many ways, the January 12th broadcast was misleading. The report focussed in on the two errors. Why did it refer only to the errors? Doing so gave the impression that the substance of Mr. Néron's letter was limited to these two erroneous statements about Mr. Thériault and Mr. Lacroix. In truth, the letter discussed other concerns relating to the image of notaries created by the broadcast. For example, Mr. Néron noted in the letter that 70 percent of recent promotions to the profession were women, so it was misleading that the CBC portrayed notaries as being "fusty old men". Mr. Néron also expressed concern about certain things that could be insinuated from the report, such as the idea that the CNQ should be put under trusteeship. In short, there was more to the letter than the two erroneous comments about Mr. Thériault and Mr. Lacroix. Having viewed the report in question, I am not at all convinced that the viewer would ever be aware of these other concerns.

Nor could the viewer be aware, from the structure of the report, that the letter was really just a request for a meeting and a right of reply. One has the impression that Mr. Néron and the CNQ wanted the content of the letter to be broadcast, that this was a criticism of the CBC's work that was meant to be aired. The context surrounding the receipt of the letter is entirely absent, if not falsely portrayed by the CBC. Thus, the CBC report starts off with the following words:

[TRANSLATION] . . . one of its communications advisers wrote to us, accusing us of having made several errors.

Tonight, we will respond to this criticism.

The CBC then goes on to highlight the portions of the letter relating to Mr. Thériault and Mr. Lacroix. The viewer is led to believe that the full content of

analysés ci-dessous, j'estime que le reportage diffusé le 12 janvier ne respecte pas les normes professionnelles du journaliste raisonnable.

(1) Le reportage diffusé donnait des renseignements incomplets sur le contenu de la lettre

Le reportage du 12 janvier était trompeur à maints égards. On y mettait l'accent sur les deux inexactitudes. Pourquoi n'y mentionnait-on que ces inexactitudes? Cette façon d'agir a donné l'impression que le contenu de la lettre de M. Néron se limitait à deux affirmations inexactes au sujet de MM. Thériault et Lacroix. À vrai dire, la lettre faisait état d'autres préoccupations relatives à l'image des notaires véhiculée par le reportage. Par exemple, M. Néron y a fait remarquer que, dernièrement, 70 pour 100 des nouveaux notaires étaient des femmes de sorte qu'il était trompeur de la part de la SRC de présenter les notaires comme des gens « poussiéreux ». Monsieur Néron craignait aussi que le reportage ne porte à insinuer notamment que la CNQ devait être mise en tutelle. Bref, la lettre contenait davantage que les deux commentaires inexacts concernant MM. Thériault et Lacroix. Après avoir visionné le reportage en question, je suis loin d'être convaincu que le téléspectateur pouvait se rendre compte de ces autres préoccupations.

De par sa présentation, le reportage ne permettait pas non plus au téléspectateur de se rendre compte que la lettre n'était en réalité qu'une demande de rencontre et de droit de réplique. Il donne l'impression que M. Néron et la CNQ voulaient que le contenu de la lettre soit diffusé et que cette lettre était une critique du travail de la SRC, qui était destinée à être diffusée. Le contexte entourant la réception de la lettre est entièrement passé sous silence, voire décrit faussement par la SRC. C'est ainsi que le reportage de la SRC commence en ces termes :

. . . l'un de ses conseillers en communication nous a écrit pour nous reprocher des erreurs que nous aurions commises.

Nous répondons ce soir à cette critique.

La SRC fait ensuite ressortir les parties de la lettre qui concernent MM. Thériault et Lacroix. Cette méthode donne aux téléspectateurs l'impression

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the letter is being addressed, which is not the case. Furthermore, the impression left of Mr. Néron is quite unflattering. The broadcast suggests that he wrote a letter criticizing the CBC and that the entire content of the letter was erroneous.

66 In a further sense, the viewer was provided with incomplete information about the letter and its content with respect to Mr. Lacroix. True, he was not reimbursed by the CNQ, but he was reimbursed by a third party. This was not mentioned. If it had been, it might have made the errors seem somewhat less egregious and Mr. Néron might not have been cast in such a negative light.

67 In sum, I agree with Fish J.A. of the Quebec Court of Appeal that, by leaving out vital pieces of information, the CBC misrepresented Mr. Néron's letter as a disingenuous attempt to mislead the CBC, and thereby the public.

(2) Refusal to Allow Mr. Néron Time to Check up on His Errors

68 I am also troubled by the haste with which the CBC set out to broadcast the errors in the letter. It does indeed seem that Mr. Néron was entrapped. Ms. Faucher contacted Mr. Néron to inform him of the errors. Mr. Néron made it very clear that the letter was merely a request for a right of reply and was not meant for publication, [TRANSLATION] "or to be communicated in any form whatsoever". Furthermore, Mr. Néron requested three days to verify the information about Mr. Thériault and Mr. Lacroix. The CBC ignored this request. Moreover, it made no mention of Mr. Néron's request for time in the January 12th report. All in all, I agree with the following finding of the trial judge, at p. 1809:

[TRANSLATION] Thus, the following question must be asked: Why was there such a rush to air the second report, which contained information known to be false, without giving Néron the opportunity to check and correct the statements that turned out to be inaccurate? Can it not be assumed that, if Néron had been able to give his side of the story and correct the inaccuracies, the content of the

que la SRC aborde tout le contenu de la lettre, alors que ce n'est pas le cas. En outre, le reportage projette une image très peu flatteuse de M. Néron. On y laisse entendre que M. Néron a rédigé une lettre dans laquelle il critique la SRC et que le contenu de cette lettre est totalement erroné.

Par ailleurs, le téléspectateur y obtient des renseignements incomplets sur la lettre et son contenu relativement à M. Lacroix. S'il est vrai que ce dernier n'a pas été remboursé par la CNQ, il l'a toutefois été par un tiers. Ce fait n'est pas mentionné. S'il l'avait été, cette mention aurait peut-être pu atténuer quelque peu les erreurs commises et empêcher de projeter une image aussi négative de M. Néron.

En somme, je conviens avec le juge Fish de la Cour d'appel du Québec que, en omettant certains renseignements indispensables, la SRC a faussement présenté la lettre de M. Néron comme une tentative fallacieuse de l'induire en erreur et, du même coup, d'induire le public en erreur.

(2) Le refus de donner à M. Néron le temps de vérifier ses prétendues affirmations inexactes

Je reste également préoccupé par l'empressement de la SRC à diffuser les inexactitudes contenues dans la lettre. Monsieur Néron semble effectivement avoir été piégé. Madame Faucher a communiqué avec M. Néron pour l'informer des inexactitudes. Monsieur Néron a bien précisé que sa lettre n'était qu'une demande de droit de réplique et n'était pas destinée à être publiée « ni [à] être communiquée sous quelque forme que ce soit ». En outre, il a demandé trois jours pour vérifier l'exactitude de ses propos concernant MM. Thériault et Lacroix. La SRC n'a pas tenu compte de cette demande. Elle ne l'a pas mentionnée non plus dans le reportage du 12 janvier. Tout bien considéré, je souscris à la conclusion suivante du juge de première instance (p. 1809) :

Alors se pose la question : Pourquoi cette précipitation et cette hâte à diffuser ce deuxième reportage, qui contient des informations que l'on sait être fausses et qu'on n'a pas donné à Néron la faculté de vérifier et corriger les affirmations qui s'avèrent être fausses? Est-ce qu'on ne peut pas penser que, si Néron avait pu donner sa version et corriger les inexactitudes, le contenu du

report would have been different? This haste is attributable not only to the journalist, but to the entire team.

Pelletier, the editor-in-chief, admitted to the Court that he was aware of the telephone conversation that took place between Faucher and Néron on January 10, 1995. He knew that Néron had asked for a short period of time to check the information himself. He knew that the Chambre [des notaires] had refused to comment on the letter and, consequently, on its content. The team nevertheless decided to broadcast the report anyway, which leads one to believe that the decision was deliberate and intentional. [Emphasis added.]

The trial judge's conclusion makes sense. The CBC intentionally and deliberately broadcast the errors in the letter before Mr. Néron could attempt to set things straight.

I further agree with Mailhot J.A. that the tone and tilt of the January 12th broadcast pointed to it being more of a response to Mr. Néron's criticism than an exercise in protecting the public interest. It might indeed be concluded that it is in the public interest to know that false rumours were circulating at the CNQ about Mr. Thériault, whom the CNQ had a mandate to protect. Unfortunately, this matter of public interest seems to have been lost in a broadcast aimed more at settling accounts for what the CBC likely saw as unjustified criticism. In the end, it may be said that the appellant broadcast information that was partly true about a question of public interest, but that was presented in an incomplete and misleading manner designed to have a maximum impact on the reputation of the claimant.

(3) The Report of the CBC's Ombudsman

Finally, it is in my opinion of great relevance that the CBC's own ombudsman found Mr. Néron's complaint to be quite serious. I will recite the relevant portion of the Ombudsman's report:

[TRANSLATION] You also accuse them of referring to two errors you allegedly made in your letter in order to make a story out of them. This part of your complaint is valid. *Le Point* decided to air a program entitled *Mise au point*, which it even described as a response to your criticism. Such a broadcast, like any news broadcast,

reportage aurait été différent? Cette hâte n'est pas seulement le fait de la journaliste mais celui de toute l'équipe.

Pelletier, le rédacteur en chef, a reconnu devant la Cour qu'il était au courant de la conversation téléphonique de Faucher et de Néron du 10 janvier 1995. Il savait que Néron avait demandé un court délai pour vérifier l'information par lui-même. Il savait que la Chambre [des notaires] avait refusé de commenter la lettre et, par conséquent, son contenu. Malgré tout cela, l'équipe a décidé de passer le reportage quand même, et il est alors permis de penser que la décision fut arrêtée de propos délibéré et intentionnel. [Je souligne.]

La conclusion du juge de première instance est logique. La SRC a intentionnellement et délibérément diffusé les inexactitudes contenues dans la lettre avant même que M. Néron ait eu la chance de rétablir les faits.

Je reconnais aussi avec le juge Mailhot que, d'après son ton et son allure, le reportage du 12 janvier ressemblait davantage à une réaction à la critique de M. Néron qu'à un exercice de protection de l'intérêt public. On pourrait en effet conclure qu'il est dans l'intérêt du public de savoir que la CNQ propageait de fausses rumeurs au sujet de M. Thériault qu'elle avait pourtant pour mission de protéger. On semble malheureusement avoir perdu de vue cette question d'intérêt public dans un reportage qui se veut davantage un règlement de compte relativement à ce que la SRC a vraisemblablement perçu comme une critique injustifiée. En définitive, on peut dire que l'appelante a diffusé une information partiellement véridique au sujet d'une question d'intérêt public, mais qu'elle l'a fait d'une manière incomplète et trompeuse dans le but de ternir le plus possible la réputation des intimés.

(3) Le rapport de l'ombudsman de la SRC

Enfin, je considère très pertinent le fait que l'ombudsman de la SRC a lui-même conclu que la plainte de M. Néron était très sérieuse. Je cite, à ce propos, le passage pertinent du rapport de l'ombudsman :

Vous leur reprochez aussi d'avoir référé à deux erreurs que vous auriez commises dans votre lettre pour en faire une nouvelle. Cet élément de votre plainte est sérieux. *Le Point* décide de diffuser une émission intitulée *Mise au point*, précisant même qu'il s'agit d'une réponse à la critique. Une telle émission, comme toute émission

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must be subject to the journalistic principles of accuracy, integrity and fairness. The January 12 broadcast seriously compromised the principle of fairness by failing to mention the five grievances that are central to your letter and only reporting on the two errors. The host did say at the beginning of the program, “*One of its [the CNQ’s] communications advisers wrote to us, accusing us of having made several errors. Tonight, we will respond to this criticism*”. It might have been expected that the “errors” you accused them of making would be looked at one by one in the program and that the point of view you expressed would be reflected impartially, thereby treating your criticism fairly and with dignity. This was not the case. In my view, making a complaint is the same as expressing an opinion. Therefore, when a complaint is discussed on air, the person making the complaint should be accorded the same rights and respect as any other person interviewed for a program, and the excerpts from the complaint that are actually broadcast must be selected, similarly to how an interview is edited, so as to represent the essence of the complaint without distortion.

Instead, they chose to discuss only the two errors in your letter. This gave the program the appearance of a settling of accounts, something that has no place at the CBC. . . . [Emphasis in original.]

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The CBC’s ombudsman considered the broadcast to have the appearance of a settling of accounts. This is highly detrimental to the CBC’s case. The Ombudsman also openly implied that *Le Point*’s journalists did not live up to proper journalistic standards, given the “wrongful pruning”, that is, the selective use of certain portions of the letter.

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Even Otis J.A., in dissent in the Quebec Court of Appeal, seemed to recognize that, by selectively quoting the letter, the broadcast fell below professional standards for journalists: [TRANSLATION] “[i]t would certainly have been desirable, in keeping with journalistic standards, to cover all aspects of the letter in the report. However, this lack of fairness does not constitute civil fault” (para. 356). With respect, by not respecting professional standards in this case, and given all the other surrounding circumstances, the CBC was at fault.

d’information, se doit d’appliquer les principes journalistiques d’exactitude, d’intégrité et d’équité. Or, l’émission du 12 janvier a sérieusement péché contre le principe de l’équité en omettant de faire état des cinq griefs qui constituaient l’essentiel de votre lettre pour ne retenir que les deux erreurs. L’animateur avait pourtant dit en début d’émission : « *L’un des conseillers en communication nous a écrit pour nous reprocher des erreurs que nous aurions commises. Nous répondons ce soir à cette critique* ». On se serait alors attendu à ce que les « erreurs » que vous leur reprochiez soient reprises une à une dans l’émission, reflétant ainsi en toute impartialité le point de vue que vous avez exprimé et traitant, de ce fait, votre critique avec justice et dignité. Ce ne fut pas fait. Je considère que formuler une plainte, c’est exprimer une opinion. Aussi, lorsqu’il est fait état d’une plainte en ondes, l’auteur de cette plainte doit bénéficier des mêmes droits et du même respect que n’importe quelle personne interviewée en vue d’une émission et les extraits de la plainte qui sont retenus pour l’émission, un peu à la manière d’un montage d’interview, doivent être choisis de façon à en retenir l’essentiel, sans déformation.

De votre lettre, on a plutôt choisi de ne retenir que vos deux erreurs. Ce qui donnait à l’émission une allure de règlement de compte qui n’a pas place à Radio-Canada. . . . [En italique dans l’original.]

L’ombudsman de la SRC était d’avis que le reportage avait des allures de règlement de compte, ce qui affaiblit considérablement la thèse de la SRC. De plus, il a laissé entendre ouvertement que les journalistes du *Point* n’avaient pas respecté les normes journalistiques applicables en procédant à un « élagage fautif », c’est-à-dire en choisissant de n’utiliser que certaines parties de la lettre.

Même la juge Otis, dissidente en Cour d’appel du Québec, semble reconnaître que, du fait que seuls certains passages de la lettre y soient cités, le reportage ne respecte pas les normes professionnelles des journalistes : « [i]l aurait certes été souhaitable, dans le respect des normes journalistiques, que tous les éléments de la lettre soient traités dans le reportage. Toutefois, ce manquement à l’équité ne constitue pas une faute civile » (par. 356). En toute déférence, compte tenu de son manquement aux normes professionnelles en l’espèce et de toutes les autres circonstances de l’affaire, la SRC a commis une faute.

(4) Conclusion With Respect to Establishing Fault

In conclusion, several factors in combination lead me to conclude that the CBC was at fault: the incomplete and misleading manner in which the content of the letter was broadcast, the refusal to allow Mr. Néron time to verify his errors, the refusal to mention that he sought this time, the fact that Mr. Néron never wanted the content of the letter to be broadcast and the adverse conclusion of the CBC's ombudsman. The CBC intentionally defamed Mr. Néron, and it did so in a manner that fell below the professional standards of a reasonable journalist.

G. *Appropriate Deference to the Trial Judge's Findings*

In keeping with this Court's recent decision in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, I have come to the conclusion that the trial judge committed no palpable and overriding errors in his determination of the facts. Likewise, I cannot conclude that the trial judge committed a palpable and overriding error in his determination that the CBC was at fault. The trial judge did not err with respect to the proper legal test. He properly grounded his test for liability in art. 1457 C.C.Q. and referred to *Radio Sept-Îles*, *supra*, and he correctly noted that journalists are subject to an obligation of means. Based on his strong findings of fact, the trial judge was correct in determining that the CBC's journalists had failed to meet their professional obligations.

H. *Condemnation In Solidum*

The trial judge found the CBC and the CNQ solidarily liable for the damages awarded as a result of their separate faults. On appeal, Fish J.A. held that it was wrong to impose solidary liability since the basis of the CBC's fault was extra-contractual and juridically independent of the contractual fault attributed by the trial judge to the CNQ. Solidarity between debtors exists, as art. 1525 C.C.Q.

(4) Conclusion relative à la démonstration de la faute

En conclusion, la combinaison de plusieurs facteurs m'incite à statuer que la SRC a commis une faute : le fait que le contenu de la lettre a été diffusé de manière trompeuse et incomplète, le refus de donner à M. Néron le temps de vérifier ses prétendues affirmations inexactes, le refus de mentionner que celui-ci avait sollicité ce délai, le fait que M. Néron n'a jamais voulu que le contenu de la lettre soit diffusé et la conclusion défavorable de l'ombudsman de la SRC. La SRC a intentionnellement diffamé M. Néron, et ce, d'une manière non conforme aux normes professionnelles du journaliste raisonnable.

G. *La déférence qui s'impose à l'égard des conclusions du juge de première instance*

Conformément aux principes établis dans l'arrêt récent de notre Cour *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33, je conclus que le juge de première instance n'a commis aucune erreur manifeste et dominante dans son appréciation des faits. De même, j'estime qu'on ne saurait affirmer que le juge de première instance a commis une erreur manifeste et dominante en décidant que la SRC a commis une faute. Le juge de première instance ne s'est pas trompé au sujet de l'identification du critère juridique applicable. Il a, à juste titre, fondé son critère de responsabilité sur l'art. 1457 C.c.Q., mentionné l'arrêt *Radio Sept-Îles*, précité, et souligné que les journalistes sont assujettis à une obligation de moyens. Compte tenu de ses solides conclusions de fait, le juge de première instance a eu raison de décider que les journalistes de la SRC avaient manqué à leurs obligations professionnelles.

H. *Condamnation in solidum*

Le juge de première instance a tenu l'appelante et la CNQ solidairement responsables en ce qui concernait les dommages-intérêts accordés en raison de leurs fautes respectives. En appel, le juge Fish a conclu qu'il était erroné de les tenir solidairement responsables étant donné que la faute de la SRC était extracontractuelle et juridiquement indépendante de la faute contractuelle imputée à la CNQ.

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provides, “only where it is expressly stipulated by the parties or imposed by law”. Fish J.A. concluded that neither condition was met in the case at bar. Instead, he found that in light of this Court’s decision in *Prévost-Masson*, *supra*, the CBC and the CNQ should be held responsible *in solidum* for Mr. Néron’s damages.

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The CBC submits that the Quebec Court of Appeal erred in finding it liable *in solidum* with the CNQ since solidarity is available only in cases where the wrongful acts caused a single injury or prejudice. The CBC also briefly suggests that Mailhot J.A. erred in concluding that there was a causal link between the news broadcast and the damages suffered by Mr. Néron. As an alternative to the order for liability *in solidum*, the CBC argues that the majority of the Court of Appeal should have ordered liability according to a “fair apportionment of the legal responsibilities of each party” (see *Prévost-Masson*, *supra*, at para. 21, and art. 1478 C.C.Q.).

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The respondents note that, in challenging the finding of causation, the CBC has failed, in its very brief submission, to show that the trial judge committed a palpable and overriding error. The respondents also contend that the CBC has failed to adduce any evidence as to how the damages should be apportioned and that, in these circumstances, the order of liability *in solidum* is well founded.

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It is my view that, based on this Court’s recent decision in *Prévost-Masson*, the order for liability *in solidum* was appropriate. In *Prévost-Masson*, this Court settled the doctrinal debate in Quebec, concluding that the concept of an obligation *in solidum* did exist in civil law. In *Prévost-Masson*, the respondent had a right to the same sum of money from two different debtors: from one as a debt for contractual liability and from the other as the balance of the selling price. The Quebec Court of Appeal had held that the debts were indivisible but this Court explained that since the debt was a sum

par le juge de première instance. Comme le prévoit l’art. 1525 C.c.Q., la solidarité entre les débiteurs n’existe « que lorsqu’elle est expressément stipulée par les parties ou prévue par la loi ». Selon le juge Fish, aucune de ces conditions n’était remplie en l’espèce. Il estimait plutôt que, eu égard à l’arrêt *Prévost-Masson*, précité, de notre Cour, la SRC et la CNQ devaient être tenues responsables *in solidum* des dommages subis par M. Néron.

L’appelante soutient que la Cour d’appel du Québec a commis une erreur en la tenant responsable *in solidum* avec la CNQ, puisque la responsabilité solidaire ne s’applique que dans les cas où les actes fautifs n’ont causé qu’un seul préjudice ou dommage. L’appelante a aussi brièvement indiqué que la juge Mailhot avait commis une erreur en concluant à l’existence d’un lien de causalité entre l’émission d’information et les dommages subis par M. Néron. Elle ajoute que, au lieu de tenir la SRC et la CNQ responsables *in solidum*, les juges majoritaires de la Cour d’appel auraient dû conclure à une responsabilité « partag[ée] [. . .] en proportion de la gravité de leur faute respective » (voir l’arrêt *Prévost-Masson*, précité, par. 21, et l’art. 1478 C.c.Q.).

Les intimés font observer que, en s’en prenant à la constatation de causalité, l’appelante n’a pas démontré, dans son argumentation très brève, que le juge de première instance avait commis une erreur manifeste et dominante. Ils prétendent aussi que l’appelante n’a produit aucun élément de preuve quant à la façon de répartir les dommages et que, dans ces circonstances, la responsabilité *in solidum* est bien fondée.

J’estime que, compte tenu de notre arrêt récent *Prévost-Masson*, la déclaration de responsabilité *in solidum* était appropriée. Dans cet arrêt, notre Cour a mis fin au débat doctrinal du Québec en concluant à l’existence du concept d’obligation *in solidum* en droit civil. Dans l’arrêt *Prévost-Masson*, l’intimée était titulaire d’une créance recouvrable indifféremment auprès de deux débiteurs : d’une part, à titre de créance de responsabilité contractuelle et, d’autre part, à titre de solde de prix de vente. La Cour d’appel du Québec avait conclu à l’indivisibilité des dettes, mais notre Cour a expliqué que,

of money, it was clearly susceptible to division. The Court also decided that the concept of “passive joint and several liability” was not applicable (see *Prévost-Masson*, *supra*, at para. 25). Instead, the Court concluded that the concept of obligation *in solidum*, which had been developed to deal with the problems that arise where the object of the debt is not susceptible to division but there is more than one debt for the whole amount, was most appropriately applicable to this situation.

J. Pineau, D. Burman and S. Gaudet have indicated that liability *in solidum* should be applied in situations such as this where two parties are responsible for an injury and one of them is liable extra-contractually while the other is liable contractually (see *Théorie des obligations* (4th ed. 2001), at pp. 676-77). In this case, the courts below concluded that, although the faults of the CBC and the CNQ were distinct in that one was based on extra-contractual liability and the other on contractual liability, the faults were “factually related, reasonably contemporaneous and cumulative in their prejudicial impact on Néron and GEN [Communication]” (see Court of Appeal judgment, at para. 280, and see also the trial judgment, at p. 1832). The damages, however, were of a global nature and, as Fish J.A. explained, it would be difficult, in practical terms, to divide the object of the global debt. Moreover, the learned trial judge is to be afforded significant deference in respect of his finding that the damages could not be easily divided. As the respondents indicate, there has been little evidence adduced to explain how the damages could be apportioned between the parties in a just fashion. As such, this is the kind of case, like *Prévost-Masson*, where the liability of the parties should be *in solidum*. I would thus dismiss the CBC’s appeal on this ground.

I. Costs

I see no reason to depart from the usual rules with respect to costs.

puisque la créance était une somme d’argent, elle était manifestement divisible. Notre Cour a ajouté que le concept de « solidarité passive » ne s’appliquait pas (voir l’arrêt *Prévost-Masson*, précité, par. 25). Elle a plutôt conclu que le concept d’obligation *in solidum*, développé pour résoudre les difficultés qui surgissent lorsque l’objet de la dette n’est pas divisible, mais qu’il y a plusieurs dettes au tout, s’appliquait le mieux à cette situation.

Selon J. Pineau, D. Burman et S. Gaudet, la responsabilité *in solidum* doit s’appliquer à des cas comme celui qui nous occupe, où la responsabilité des coauteurs d’un préjudice est pour l’un extra-contractuelle, et pour l’autre contractuelle (voir *Théorie des obligations* (4^e éd. 2001), p. 676-677). En l’espèce, les tribunaux d’instance inférieure ont conclu que, même si les fautes de la SRC et de la CNQ restaient distinctes en ce sens qu’elles étaient respectivement de nature extracontractuelle et de nature contractuelle, elles étaient néanmoins [TRADUCTION] « connexes sur le plan factuel en plus d’être raisonnablement concomitantes, et elles [avaient] une incidence cumulative sur M. Néron et GEN [Communication] » (voir jugement de la Cour d’appel, par. 280, et jugement de première instance, p. 1832). Les dommages étaient toutefois de nature globale et, comme l’a expliqué le juge Fish, il serait difficile, en pratique, de diviser l’objet d’une telle créance globale. De surcroît, il faut traiter avec beaucoup de déférence la conclusion du juge de première instance selon laquelle il n’était pas facile de répartir les dommages entre les défendeurs. Comme le soulignent les intimés, on a présenté très peu d’éléments de preuve au sujet de la façon de procéder à une répartition juste des dommages entre les parties. Par conséquent, cette affaire présente une situation similaire à celle de l’affaire *Prévost-Masson*, où la responsabilité des parties doit être *in solidum*. Je suis donc d’avis de rejeter le pourvoi de l’appelante pour ce motif.

I. Dépens

Je ne vois aucune raison de déroger aux règles habituelles en matière de dépens.

VI. Conclusion

81 As a result, I would dismiss the appeal with costs.

The following are the reasons delivered by

82 BINNIE J. (dissenting) — I cannot subscribe to the proposition of my colleague LeBel J. that civil liability should be imposed on the Canadian Broadcasting Corporation (“CBC”) to pay \$673,153 in damages because, as he puts it (at para. 55):

... the information broadcast may have been true — at least in part (to be discussed below) — and it may have been in the public interest to broadcast it, but the whole of the broadcast quite simply did not measure up to professional standards.

83 The information that *was* published was perfectly true, but my colleague’s concern seems to be that the “truth” could have been put in a different light if additional matters had been included in the broadcast (para. 68). I do not agree that in this case what *was not* broadcast made what *was* broadcast any the less true. My deeper concern is that in balancing press freedom against the respondents’ interest in the protection of their reputation, my colleague puts insufficient weight on the constitutional right of members of the Quebec public to have access to true and accurate information about matters of legitimate interest and concern. An award of this size built on such a thin foundation can only discourage the fulfilment by the media of their mandate in a free and democratic society to afflict the comfortable and to comfort the afflicted, to quote Joseph Pulitzer, a mandate now protected by s. 2(b) of the *Canadian Charter of Rights and Freedoms* and s. 3 of the *Quebec Charter of Human Rights and Freedoms*, R.S.Q., c. C-12.

84 I agree with Otis J.A. of the Quebec Court of Appeal ([2002] R.J.Q. 2639) that the real culprit in this case is the Chambre des notaires du Québec (“CNQ”). For many of the same reasons that she has given, I would allow the appeal of the CBC. The

VI. Conclusion

Par conséquent, je suis d’avis de rejeter le pourvoi avec dépens.

Version française des motifs rendus par

LE JUGE BINNIE (dissident) — Je ne puis souscrire à la proposition de mon collègue le juge LeBel voulant qu’il y ait lieu de déclarer le média appelant civilement tenu de payer la somme de 673 153 \$ de dommages-intérêts, parce que, comme il le dit au par. 55, même s’il

se peut que l’information diffusée ait été véridique — du moins en partie, comme nous le verrons plus loin — et qu’il ait été dans l’intérêt public de la diffuser, [. . .] dans l’ensemble, le reportage diffusé ne respecte tout simplement pas les normes professionnelles.

L’information *rendue* publique était tout à fait véridique, mais, pour mon collègue, il semble que la « vérité » aurait pu être présentée sous un jour différent si des informations additionnelles avaient été diffusées (par. 68). Je ne suis pas d’accord pour dire qu’en l’espèce l’information *non* diffusée compromettrait de quelque façon la véracité de celle qui *a été* diffusée. Je crains davantage que, en soupesant la liberté de presse en fonction du droit des intimés à la sauvegarde de leur réputation, mon collègue n’accorde pas suffisamment d’importance au droit constitutionnel de la population québécoise à une information véridique et exacte concernant des questions d’intérêt légitime pour elle. L’attribution d’un montant aussi considérable pour des raisons aussi peu convaincantes ne peut avoir pour effet que de dissuader les médias de remplir la mission qu’ils ont, dans une société libre et démocratique, d’affliger les gens confortables et de reconforter les affligés — pour reprendre l’expression de Joseph Pulitzer —, laquelle est désormais protégée par l’al. 2b) de la *Charte canadienne des droits et libertés* et l’art. 3 de la *Charte des droits et libertés de la personne*, L.R.Q., ch. C-12.

Je conviens avec la juge Otis de la Cour d’appel du Québec ([2002] R.J.Q. 2639) que la vraie coupable, en l’espèce, est la Chambre des notaires du Québec (« CNQ »). Pour un bon nombre des raisons qu’elle a exposées, j’accueillerais le pourvoi de la

effect of such a disposition would be to leave the liability for the payment of the respondents' damages with the CNQ, where it belongs.

I. Facts

The relevant circumstances are fully set out by my colleague LeBel J. and I will therefore limit myself to the facts needed to explain my legal conclusion.

The original broadcast on *Le Point* on December 15, 1994 dealt with the CNQ as an important public institution exercising self-government responsibilities over the notarial profession. It was strongly critical. One of its allegations was that the CNQ had manifested a high-handed and unprofessional approach to people who made legitimate complaints about the work of its members. The broadcast detailed a number of instances where complainants had been ignored or abused. The message was that the CNQ, in its dealings with the public, was dysfunctional. At the time, this seems to have been true. It was certainly in the public interest to draw attention to such a deplorable state of affairs.

The broadcast relied in part on two complainants, Messrs. Yvon Thériault and Richard Lacroix, who agreed to be interviewed on the air. On learning about the broadcast, the CNQ (without checking its facts) leapt to the attack, alleging (erroneously) that Mr. Lacroix had lied about his complaint because the CNQ had in fact reimbursed him for a loss suffered at the hands of one of its members, and that Mr. Thériault's brother was the leader of a bizarre and violent cult. The CNQ instructed their communications consultant, Mr. Gilles Néron, to write to the CBC. This instruction was carried out by Mr. Néron in a letter to the director at *Le Point* dated December 18, 1994, the contents of which are set out in full by my colleague LeBel J. at para. 3.

After introducing himself as spokesperson for the CNQ and requesting a meeting with the CBC to pursue an on-air reply, Mr. Néron's letter went on

Société Radio-Canada (« SRC »). Cette décision ferait en sorte que la responsabilité de payer des dommages-intérêts aux intimés incomberait uniquement, comme il se doit, à la CNQ.

I. Les faits

Comme mon collègue le juge LeBel expose de façon complète les faits pertinents, je m'en tiendrai à ceux nécessaires pour expliquer la conclusion que je tire sur le plan juridique.

Le premier reportage du *Point*, diffusé le 15 décembre 1994, portait sur la CNQ en tant qu'institution publique importante qui assume des responsabilités relatives à l'autogestion des membres de la profession notariale. Le reportage était fort négatif. On y alléguait notamment que la CNQ avait adopté une attitude autoritaire et non professionnelle envers des gens qui s'étaient plaints avec raison du travail de ses membres. Le reportage faisait état d'un certain nombre de cas où les plaignants avaient été ignorés ou encore malmenés. Le message véhiculé était que la CNQ était dysfonctionnelle dans ses rapports avec le public. Cela semblait être le cas à l'époque. Il était sûrement dans l'intérêt public de dénoncer cette situation déplorable.

Le reportage présentait notamment deux plaignants qui avaient accepté d'être interviewés, à savoir MM. Yvon Thériault et Richard Lacroix. Après avoir pris connaissance du reportage, la CNQ (sans s'être donné la peine de vérifier les faits rapportés) est passée directement à l'attaque en alléguant (à tort) que M. Lacroix avait menti au sujet de sa plainte — étant donné qu'elle lui avait, en réalité, remboursé la perte causée par l'un de ses membres — et que le frère de M. Thériault était à la tête d'une secte étrange et violente. La CNQ a demandé à son consultant en communication, Gilles Néron, d'écrire à l'appelante. Monsieur Néron a donné suite à cette demande, le 18 décembre 1994, en faisant parvenir à la réalisatrice du *Point* une lettre dont mon collègue le juge LeBel expose intégralement le contenu au par. 3.

Après s'être présenté comme le porte-parole de la CNQ et avoir demandé une rencontre avec l'appelante afin d'obtenir le droit de répliquer dans le

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to confirm, albeit inadvertently, more or less what the CBC had said about the CNQ in its December 15 broadcast; namely that by launching an attack on Messrs. Thériault and Lacroix the CNQ showed again that it could not get its facts straight and that its response to legitimate criticism was ill-informed, ill-considered and unworthy of a professional governing body.

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Specifically, the false allegations made by the CNQ and repeated by Mr. Néron in his December 18 letter were as follows:

[TRANSLATION]

- 3- In the report, the death threats made against the president are referred to as nonsense. Mr. Thériault is presented as a person who would be justified in making such threats. You failed to mention that he is the brother of the Thériault who was the Pope of the Infinite Love cult and who cut off his spouse's arm. [Emphasis deleted.]

It is now accepted that the allegation about Mr. Thériault's brother was totally unfounded. With respect to Mr. Lacroix, the CNQ, through Mr. Néron, categorically stated that his complaint about non-reimbursement by the CNQ was false:

[TRANSLATION]

- 4- You also failed to mention in the report that Mr. Lacroix was reimbursed by the CNQ for the money he lost.

. . .

- 2- Your conclusion that "Mr. Lacroix is considering writing to the Minister to ask him to put the CNQ under trusteeship" gave some people the impression that the chairman of the Office [des professions] was going to make this request, while others were left thinking that Le Point's reporters came to this conclusion after their investigation. [Emphasis added; emphasis in original deleted.]

In fact, Mr. Lacroix had been reimbursed, but not by the CNQ. The CNQ was therefore wrong to claim the credit. Mr. Néron's added complaint about the

cadre d'une autre émission, M. Néron a, dans sa lettre, plus ou moins confirmé, quoique par inadvertance, ce que l'appelante avait dit au sujet de la CNQ dans son reportage du 15 décembre, à savoir qu'en attaquant MM. Thériault et Lacroix cette dernière avait, là encore, démontré qu'elle était incapable de rétablir les faits et qu'en plus de manquer de rigueur sa réponse à une critique légitime était irréfléchie et indigne d'un ordre professionnel.

Plus précisément, les fausses allégations de la CNQ que M. Néron reprenait dans sa lettre du 18 décembre étaient les suivantes :

- 3- Dans le reportage on fait référence aux menaces de mort à l'endroit de la présidence comme une baliverne. On présente M. Thériault comme une personne qui a bien raison de faire ces menaces. Vous n'avez pas fait référence au fait qu'il est le frère de ce Thériault, le Pape de la secte de l'Amour infini qui avait coupé le bras de sa conjointe. [Soulignement omis.]

On reconnaît maintenant que l'allégation relative au frère de M. Thériault était totalement dénuée de fondement. Quant à M. Lacroix, la CNQ, s'exprimant par l'entremise de M. Néron, a affirmé catégoriquement que sa plainte voulant qu'elle ne l'ait pas remboursé n'était pas fondée :

- 4- Dans le reportage, vous ne dites pas, non plus, que M. Lacroix avait été remboursé par la CNQ pour les sommes qu'il avait perdues.

. . .

- 2- Votre conclusion « M. Lacroix songe à écrire au ministre pour lui demander de placer la CNQ en tutelle » a donné l'impression à certains que c'est le président de l'Office [des professions] qui allait le demander et à d'autres que les reporter [*sic*] du Point arrivaient à cette conclusion après leur enquête. [Je souligne; soulignement dans l'original omis.]

En fait, M. Lacroix avait été remboursé, mais pas par la CNQ. La CNQ avait donc tort de s'en attribuer le mérite. L'autre plainte de M. Néron

“impression” attributed to some unidentified people added nothing of substance.

The other purported clarification by the CNQ, through Mr. Néron, was flattering to the CNQ but simply argumentative:

[TRANSLATION]

5- I also have difficulty understanding the reference to notary Potiron, the fusty old man. I found this allusion inappropriate. The notarial profession has a 128-year history of faithful service in Quebec. There are many young notaries. They are excellent, dynamic and innovative legal professionals.

The subsequent behaviour of the CBC’s journalists in avoiding contact with Mr. Néron was boorish, but boorishness without more is not actionable. Eventually, on January 4, 1995, the CBC offered the CNQ a follow-up interview, as it ought to have done more promptly. However at that point, the CNQ, after undergoing a reversal of position, refused the offer. In the result, the journalists were simply left with a potential story about the impetuous and ill-founded allegations contained in Mr. Néron’s letter of December 18th.

Mr. Néron, as well as the CNQ, attempted in their different ways to extricate themselves from the untenable position into which the CNQ blunders had led them. Belatedly, Mr. Néron asked for time to check the truth of the CNQ’s allegations. The CNQ, for its part, having withdrawn its request for a reply, proceeded to disclaim responsibility for Mr. Néron’s original request for a reply interview, and attempted to make Mr. Néron the scapegoat for its own series of errors. Thereafter, it completed the assault on Mr. Néron’s professional reputation by circulating misleading statements about Mr. Néron to the entire CNQ membership.

The CBC’s own ombudsman, as LeBel J. explains, found that the CBC’s follow-up broadcast on January 12th showed selectivity and a lack of balance. He found that the focus on the CNQ’s misinformation gave the broadcast [TRANSLATION] “the appearance of a settling of accounts”. However,

concernant l’« impression » donnée à d’autres personnes non identifiées n’ajoutait rien d’important.

L’autre prétendue clarification que la CNQ a apportée, par l’entremise de M. Néron, était flatteuse pour elle, mais n’était rien de plus qu’un argument :

5- Je ne comprends pas, non plus, la référence au notaire Potiron, le poussiéreux. J’ai trouvé l’allusion déplacée. Le notariat au Québec a 128 ans d’histoire en loyaux services. Il y a beaucoup de jeunes notaires. Ils sont d’excellents juristes, dynamiques et avanguardistes [*sic*].

Le comportement que les journalistes de l’appelante ont adopté par la suite en évitant tout contact avec M. Néron était impoli, mais l’impolitesse sans plus ne confère pas un droit d’action. Le 4 janvier 1995, l’appelante a finalement offert un interview complémentaire à la CNQ, comme elle aurait dû le faire plus tôt. Cependant, la CNQ, qui s’était alors ravisée, a refusé l’offre. En définitive, le seul sujet de reportage dont disposaient les journalistes était les allégations impétueuses et non fondées contenues dans la lettre du 18 décembre de M. Néron.

Monsieur Néron et la CNQ ont tenté, chacun à sa manière, de se sortir de la situation intenable dans laquelle les bourdes de la CNQ les avaient plongés. Monsieur Néron a demandé tardivement un délai pour vérifier l’exactitude des allégations de la CNQ. De son côté, après avoir retiré sa demande de droit de réplique, la CNQ s’est complètement dissociée de M. Néron en ce qui concerne la première demande d’interview complémentaire qu’il avait présentée et a tenté de le blâmer pour la série d’erreurs qu’elle avait elle-même commise. Par la suite, elle s’en est prise davantage à la réputation professionnelle de M. Néron en distribuant à tous ses membres des déclarations trompeuses à son sujet.

Comme l’explique le juge LeBel, l’ombudsman de la SRC a lui-même estimé que la présentation du reportage complémentaire diffusé le 12 janvier était sélective et boiteuse. Il a conclu que l’insistance sur l’information inexacte donnée par la CNQ donnait au reportage « une allure de règlement de

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he did not conclude that the public was *misinformed* or that the broadcast was not *in the public interest*. In fact, on this second point he concluded that the public interest was well-served by calling attention to the CNQ's continuing parade of errors.

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Journalism inevitably involves selectivity. What was broadcast on January 12th *was* true. With all due respect for the contrary position, my view is that despite the journalists' boorish treatment of Mr. Néron prior to January 12th and the selectivity evident in the January 12th broadcast (which no doubt demonstrated elements of "gotcha" journalism), civil fault should nevertheless not be attributed to the CBC when all the relevant public interest issues are taken into account, a matter to which I will now turn.

II. The Absence of Civil Fault

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Article 1457 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."), which delineates the relevant principles of civil fault, is to be interpreted in light of the *Code's* preliminary provision:

The Civil Code of Québec, in harmony with the Charter of human rights and freedoms and the general principles of law, governs persons, relations between persons, and property. [Emphasis added.]

The public's right to a society where free expression can flourish is guaranteed by s. 3 of the Quebec *Charter*. Thus, the proper legal framework within which to consider the present appeal is not simply a bilateral dispute between the CBC and the respondents, but a multilateral dispute involving not only the disputants but the broader Quebec public which had a serious ongoing stake in the proper functioning of the CNQ as a vitally important public institution. Lamer J. (as he then was) commented in *Snyder v. Montreal Gazette Ltd.*, [1988] 1 S.C.R. 494, in speaking of the assessment of non-pecuniary damages for defamation under the *Civil Code of Québec*, at p. 510:

In coming to the rescue of a defamation victim, the courts must not overlook the fact that the written and spoken

compte ». Cependant, il n'a pas jugé que le public était *mal renseigné* ou que le reportage n'était pas *d'intérêt public*. En fait, il a estimé, dans ce dernier cas, qu'il était dans l'intérêt public de dénoncer la série d'erreurs commises par la CNQ.

La sélectivité est inhérente au journalisme. L'information diffusée le 12 janvier *était* véridique. En toute déférence pour l'opinion contraire, j'estime que, malgré la façon impolie dont les journalistes ont traité M. Néron avant le 12 janvier et la sélectivité manifeste du reportage du 12 janvier (qui caractérisent indubitablement le journalisme d'embuscade), il n'y a tout de même pas lieu d'imputer à l'appelante une faute civile compte tenu de toutes les questions d'intérêt public pertinentes, sujet que je vais maintenant examiner.

II. L'absence de faute civile

L'article 1457 du *Code civil du Québec*, L.Q. 1991, ch. 64 (« C.c.Q. »), qui énonce les principes applicables en matière de faute civile, doit être interprété en fonction de la disposition préliminaire du *Code* qui prévoit ceci :

Le Code civil du Québec régit, en harmonie avec la Charte des droits et libertés de la personne et les principes généraux du droit, les personnes, les rapports entre les personnes, ainsi que les biens. [Je souligne.]

L'article 3 de la *Charte* québécoise garantit le droit de la population à une société qui défend la liberté d'expression. Donc, le cadre juridique dans lequel doit se situer l'examen du présent pourvoi est non pas un simple litige bilatéral entre l'appelante et les intimés, mais un litige plurilatéral qui met en cause non seulement les parties mais encore la population générale du Québec qui avait sérieusement intérêt à ce que la CNQ, en tant qu'institution publique de la plus haute importance, fonctionne bien. Voici ce que le juge Lamer (plus tard Juge en chef) fait remarquer, dans l'arrêt *Snyder c. Montreal Gazette Ltd.*, [1988] 1 R.C.S. 494, p. 510, au sujet de l'évaluation des dommages moraux en matière de diffamation sous le régime du *Code civil du Québec* :

La justice qui vient en aide à la victime d'une diffamation ne doit pas oublier que la presse écrite et parlée est

press is indispensable and is an essential component of a free and democratic society.

Despite the reference by my colleague LeBel J. at paras. 48 and following to some of the leading decisions of this Court upholding the importance of freedom of expression, including *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, and *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459, I do not believe that his proposed disposition of this appeal gives proper weight to that aspect of the public interest.

I accept, as does LeBel J., that it is appropriate to anchor the discussion in the Quebec Court of Appeal's decision in *Société Radio-Canada v. Radio Sept-Îles Inc.*, [1994] R.J.Q. 1811. That decision, interpreting civil responsibility in matters of defamation under art. 1053 of the *Civil Code of Lower Canada*, held that, unlike the situation in the common law jurisdictions, [TRANSLATION] "there are situations in which a person who communicates information may be civilly liable even if the information is true" (pp. 1818-19). Thus:

[TRANSLATION]

(a) A person commits a fault by "saying" unpleasant or unfavourable things about another that he or she knows to be false.

. . .

(b) A person commits a fault by "saying" unpleasant or unfavourable things about another that he or she ought to know to be false.

. . .

(c) A person commits a fault by making unfavourable comments about another, even if they are true, if he or she makes them without valid reason. [Italics deleted; underlining added.]

(Page 1819, citing J. Pineau and M. Ouellette, *Théorie de la responsabilité civile* (2nd ed. 1980), at pp. 63-64.)

indispensable et constitue une valeur essentielle dans une société libre et démocratique.

Malgré la mention que mon collègue le juge LeBel fait, aux par. 48 et suivants, de certains arrêts de principe dans lesquels notre Cour confirme l'importance de la liberté d'expression, notamment les arrêts *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573, *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, et *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1991] 3 R.C.S. 459, je ne crois pas que la façon dont il propose de trancher le présent pourvoi accorde suffisamment d'importance à cet aspect de l'intérêt public.

À l'instar du juge LeBel, je reconnais qu'il convient de fonder l'analyse sur l'arrêt de la Cour d'appel du Québec *Société Radio-Canada c. Radio Sept-Îles Inc.*, [1994] R.J.Q. 1811. Dans cet arrêt, en interprétant la responsabilité civile pour diffamation régie par l'art. 1053 du *Code civil du Bas-Canada*, la cour a conclu que, contrairement à la situation qui prévaut dans les ressorts de common law, « la communication d'une information même vraie peut parfois engager la responsabilité civile de son auteur » (p. 1818-1819). Par conséquent :

a) On commet une faute en « disant » sur autrui des choses désagréables ou défavorables que l'on sait être fausses.

. . .

b) On commet une faute en « disant » sur autrui[i] des choses désagréables ou défavorables que l'on devrait savoir être fausses.

. . .

c) On commet une faute en tenant sur autrui des propos défavorables, même s'ils sont vrais, lorsqu'on le fait sans justes motifs. [Italiques omis; je souligne.]

(Page 1819, citant J. Pineau et M. Ouellette, *Théorie de la responsabilité civile* (2^e éd. 1980), p. 63-64.)

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- 98 In *Prud'homme v. Prud'homme*, [2002] 4 S.C.R. 663, 2002 SCC 85, this Court confirmed this same approach for the purposes of art. 1457 C.C.Q. noting, with respect to the third branch, that “even in the civil law, the truth of what is said may be a way of proving that no wrongful act was committed, in circumstances in which the public interest is in issue” (para. 37 (emphasis added)).
- 99 This is not to say that the media are unconstrained by the usual principles of civil fault. The media are bound by the same law as everybody else. It is the *function* of free expression that is protected, and the media organizations derive their protection from what they do rather than who they are.
- 100 Counsel for the CBC submitted with some indignation at the oral hearing:
- [TRANSLATION] If I may sum up the comments of Madam Justice Mailhot, she accuses my clients of having discovered the truth and having spoken it.
- This is an oversimplification of a complex issue. To agree to work professionally with the media, as Mr. Néron did, is not to agree to dance with wolves. There are proper limits to the protection that ought to be extended to the media even in the exercise of their constitutionally protected function. The question is whether those limits have been breached in this case.
- 101 My colleague LeBel J., at para. 73, mentions five factors which lead him to conclude that a finding of civil fault should be made against the CBC, namely
- the incomplete and misleading manner in which the content of the letter was broadcast, the refusal to allow Mr. Néron time to verify his errors, the refusal to mention that he sought this time, the fact that Mr. Néron never wanted the content of the letter to be broadcast and the adverse conclusion of the CBC's ombudsman.
- 102 In my view, with respect, none of these factors (whether taken individually or cumulatively) are sufficient to support a finding of civil responsibility. In so stating, I give very limited weight to the
- Dans l'arrêt *Prud'homme c. Prud'homme*, [2002] 4 R.C.S. 663, 2002 CSC 85, notre Cour a confirmé que la même approche devait être adoptée pour les besoins de l'art. 1457 C.c.Q., en faisant remarquer, au sujet du troisième volet, que « même en droit civil, la véracité des propos peut constituer un moyen de prouver l'absence de faute dans des circonstances où l'intérêt public est en jeu » (par. 37 (je souligne)).
- Cela ne signifie pas que les principes habituels de la faute civile ne s'appliquent pas aux médias. Les mêmes lois s'appliquent à tous, y compris aux médias. C'est la *fonction* de la liberté d'expression qui est protégée, et les médias sont protégés à cause de ce qu'ils font et non à cause de ce qu'ils sont.
- À l'audience, l'avocate de l'appelante a affirmé avec une certaine indignation ce qui suit :
- En fait, si je résume le propos de madame la juge Mailhot, elle reproche à mes clients d'avoir découvert la vérité et de l'avoir dite.
- Il s'agit là d'une conception simpliste d'un problème complexe. Accepter d'offrir des services professionnels aux médias, comme l'a fait M. Néron, ne revient pas à accepter de se jeter dans la fosse aux lions. La protection à laquelle doivent avoir droit les médias doit connaître certaines limites, même lorsqu'ils exercent leur rôle protégé par la Constitution. La question est de savoir si ces limites ont été dépassées dans la présente affaire.
- Mon collègue le juge LeBel mentionne, au par. 73, cinq facteurs qui l'ont amené à conclure que l'appelante a commis une faute civile :
- le fait que le contenu de la lettre a été diffusé de manière trompeuse et incomplète, le refus de donner à M. Néron le temps de vérifier ses prétendues affirmations inexacts, le refus de mentionner que celui-ci avait sollicité ce délai, le fait que M. Néron n'a jamais voulu que le contenu de la lettre soit diffusé et la conclusion défavorable de l'ombudsman de la SRC.
- En toute déférence, j'estime que ces facteurs (considérés individuellement ou ensemble) ne sont pas suffisants pour étayer une conclusion de responsabilité civile. À cet égard, j'accorde très peu

trial judge's criticism of the second broadcast. The trial judge got off on the wrong foot in characterizing Mr. Néron's letter of December 18, 1994 as a private communication. This mischaracterization coloured the rest of his analysis.

A. *The Allegedly Incomplete and Misleading Manner in Which the Content of the Letter Was Broadcast*

I do not, with respect, accept my colleague's characterization of the December 18th letter as "really just a request for a meeting and right of reply" (para. 65). As is evident from a reading of the text set out at para. 3, the letter is approximately two pages in length, with only part of the first page devoted to the request for a right of reply. The letter alleges errors in the original broadcast in relation to the on-air complainants Messrs. Lacroix and Thériault, and it was appropriate to bring these allegations to the attention of viewers, together with the journalists' response.

Like Otis J.A., I accept as correct the finding of the Ombudsman that according to desirable journalistic practice, the January 12th broadcast ought to have presented Mr. Néron's letter in a more complete and balanced fashion. However, the real sting of the broadcast was that the CNQ was continuing to act in an impetuous and unprofessional manner. It documented why the allegations contained in Mr. Néron's December 18th letter were erroneous and pointed out the ease with which these errors were verified by the journalists, and ought to have been known to the CNQ. Had the other points made in Mr. Néron's letter been broadcast they would not (as discussed below) have pulled the sting, or served the public interest in any substantial way, or, for that matter, have helped to protect Mr. Néron's reputation. The selectivity and lack of balance found by the Ombudsman did not subvert the truth of the *real* matter of interest to the public, namely the truth of the CNQ's allegations pertaining to Messrs. Thériault and Lacroix.

d'importance à la critique du deuxième reportage formulée par le juge de première instance. Ce dernier a eu tort de commencer par qualifier de communication privée la lettre du 18 décembre 1994 de M. Néron. Cette qualification erronée a faussé le reste de son analyse.

A. *La manière incomplète et trompeuse dont le contenu de la lettre aurait été diffusé*

En toute déférence, je ne souscris pas aux propos de mon collègue lorsqu'il affirme que la lettre du 18 décembre n'est « en réalité qu'une demande de rencontre et de droit de réplique » (par. 65). Il est clair, à la lecture du par. 3, que la lettre compte environ deux pages et que seule une partie de la première page est consacrée à la demande de droit de réplique. On y allègue que le premier reportage comporte des inexactitudes au sujet des plaignants qui y témoignent, à savoir MM. Lacroix et Thériault, et il convenait d'attirer l'attention des téléspectateurs sur ces allégations et sur la réponse des journalistes.

À l'instar de la juge Otis, je considère juste la conclusion de l'ombudsman que, selon la pratique journalistique souhaitable, le reportage du 12 janvier aurait dû présenter la lettre de M. Néron d'une manière plus complète et équilibrée. Toutefois, le véritable tort causé par le reportage était le fait d'indiquer que la CNQ continuait d'agir de manière impétueuse et non professionnelle. On y expliquait pourquoi les allégations contenues dans la lettre du 18 décembre de M. Néron étaient inexactes et on y soulignait la facilité avec laquelle les journalistes avaient pu en constater l'inexactitude, qui aurait dû être évidente pour la CNQ. Si elles avaient été diffusées, les autres remarques contenues dans la lettre de M. Néron n'auraient (comme nous le verrons plus loin) ni remédié au tort causé ni été essentiellement d'intérêt public ou, du reste, utiles pour sauvegarder la réputation de M. Néron. La conclusion au caractère sélectif et boiteux tirée par l'ombudsman n'a rien changé à la véracité de la *vraie* question d'intérêt public, à savoir la véracité des allégations de la CNQ concernant MM. Thériault et Lacroix.

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B. *The CBC's Refusal to Allow Mr. Néron Time to Verify His Errors*

105 Again, while this courtesy ought properly have been extended to Mr. Néron, the allegations against Messrs. Thériault and Lacroix were demonstrably false whether or not Mr. Néron belatedly took the opportunity to verify them. Had Mr. Néron publicly acknowledged their falsity, it would simply have added to the impression on viewers that the CNQ had responded to the original broadcast with a misinformed attack on Messrs. Thériault and Lacroix, for which the CNQ could justly be called to account.

C. *The CBC's Refusal to Mention That Mr. Néron Sought a Delay*

106 An accuser is supposed to know whereof he speaks *before* an attack is launched. It would not have improved Mr. Néron's reputation to report that he wanted time to find out about the truth of the CNQ allegations only *after* they were made.

D. *The Fact That Mr. Néron Never Wanted the Contents of the Letter Broadcast*

107 This is a variation of the trial judge's original ruling that the letter of December 18 was somehow "private". I agree with Mailhot and Otis J.J.A. that the CBC was entitled to consider the information it had received to be public. There was no indication in Mr. Néron's letter to the contrary. In this respect, I adopt the reasoning of Otis J.A. (at para. 345):

[TRANSLATION] Finally, no statement, either implied or express, of confidentiality was made in the letter of December 18, 1994. Nor was any promise of confidentiality obtained from the CBC at the time of sending of the letter, which as of that time became information that the television broadcasting media were entitled to take note of and disseminate.

To send a letter to the press alleging errors in a broadcast and launching a personal attack against news sources without first verifying the foundation

B. *Le refus de la SRC de donner à M. Néron le temps de vérifier ses prétendues affirmations inexactes*

Là encore, même si on avait dû avoir la politesse de donner à M. Néron le temps nécessaire pour vérifier l'exactitude de ses propos, les allégations dont étaient l'objet MM. Thériault et Lacroix étaient manifestement fausses peu importe que M. Néron ait tardé à les vérifier. Si M. Néron avait publiquement reconnu la fausseté de ces allégations, cela aurait simplement eu pour effet d'accroître l'impression des téléspectateurs que la CNQ avait riposté au premier reportage en soumettant MM. Thériault et Lacroix à des attaques comportant des inexactitudes, dont elle pouvait à juste titre être appelée à rendre compte.

C. *Le refus de la SRC de mentionner que M. Néron avait sollicité un délai*

Un accusé est censé savoir de quoi il parle *avant* de passer à l'attaque. Il n'aurait pas été mieux pour la réputation de M. Néron de rapporter qu'il avait sollicité un délai pour vérifier l'exactitude des allégations de la CNQ seulement *après* qu'elles eurent été formulées.

D. *Le fait que M. Néron n'a jamais voulu que le contenu de la lettre soit diffusé*

Il s'agit là d'une variante de la décision initiale du juge de première instance que la lettre du 18 décembre était de toute façon « privée ». Je souscris à l'opinion des juges Mailhot et Otis que la SRC pouvait considérer publique l'information qu'elle avait reçue. Rien n'indiquait le contraire dans la lettre de M. Néron. À cet égard, j'adopte le raisonnement de la juge Otis (par. 345) :

Enfin, aucune mention de confidentialité, implicite ou expresse, n'apparaît dans la lettre du 18 décembre 1994. De plus, aucun engagement de confidentialité n'a été obtenu de la SRC au moment de la transmission de la lettre qui, dès lors, constituait une information que le média de télédiffusion était en droit de recueillir et de diffuser.

S'expose à des ennuis la personne qui adresse à la presse une lettre dans laquelle elle allègue qu'un reportage diffusé comporte des inexactitudes, et qui,

for these allegations is to invite trouble. Of course, once Mr. Néron recognized that he might be on thin ice, he quite naturally sought a graceful exit. However, by that time the CNQ allegations were like missiles that once launched are beyond recall.

E. The Adverse Conclusions of the CBC's Ombudsman

The CBC's ombudsman criticised aspects of the January 12th broadcast. However the effort of media organizations to improve their standards of performance should not be discouraged by equating valid journalistic criticism with a finding of civil fault. The Ombudsman was not concerned with balancing the values of a free press and the respect for reputation. Nor was it within the Ombudsman's mandate to determine whether Mr. Néron's reputation would have fared better or worse had a higher standard of journalism been observed, given that the damaging sting would have remained even in a more balanced presentation, albeit more appropriately packaged. Rather, the Ombudsman was examining the second broadcast in light of the [TRANSLATION] "journalistic principles of accuracy, integrity and fairness". No doubt these principles are all relevant in the determination of reasonableness under art. 1457 C.C.Q., but they are not the only relevant principles.

Our Court in *Prud'homme*, at para. 72, concluded with respect to the allegation of defamation in that case that "[i]t would of course have been wiser to mention" (emphasis added) some omitted information, but that "having regard to the circumstances" these deficiencies of presentation did not engage civil responsibility. And so it is in this case. I concur with Otis J.A. that (at para. 356)

[TRANSLATION] this lack of fairness does not constitute civil fault. Neither the nature nor the purpose of the report would have changed in any way had the public known that the CNQ was unhappy (1) that the December 15, 1994 broadcast of the first report was repeatedly advertised in advance, (2) that viewers may have been left with the impression that the chairman of the Office des

sans prendre la peine de vérifier si ses allégations sont fondées, se livre à des attaques personnelles contre les sources d'information. Il va sans dire que, dès qu'il a reconnu qu'il pouvait s'être aventuré sur un terrain glissant, M. Néron a tout naturellement tenté de s'en sortir sans que sa réputation en souffre. Cependant, les allégations de la CNQ se comparaient alors à des missiles qui avaient été lancés sans possibilité de retour.

E. Les conclusions négatives de l'ombudsman de l'appelante

L'ombudsman de l'appelante a critiqué, à certains égards, le reportage du 12 janvier. Toutefois, les médias ne devraient pas être dissuadés d'améliorer la qualité de leur travail en assimilant une critique journalistique valable à une conclusion de faute civile. L'ombudsman ne s'est pas soucié de mettre en balance les valeurs de la liberté de presse et la sauvegarde de la réputation. Il n'était pas autorisé non plus à décider si la réputation de M. Néron aurait été meilleure ou pire si une norme journalistique plus élevée avait été respectée, étant donné que le tort causé aurait persisté même si le reportage avait été plus équilibré, ne serait-ce que mieux présenté. L'ombudsman a plutôt examiné le deuxième reportage en fonction des « principes journalistiques d'exactitude, d'intégrité et d'équité ». Il n'y a aucun doute que ces principes sont tous utiles pour déterminer ce qui est raisonnable pour les besoins de l'art. 1457 C.c.Q., mais ce ne sont pas les seuls.

Dans l'arrêt *Prud'homme*, par. 72, notre Cour a conclu, au sujet de l'allégation de diffamation dans cette affaire, que « [c]ertes, il aurait été plus prudent de mentionner » (je souligne) certains renseignements qui avaient été omis, mais que, « à la lumière des circonstances », ces lacunes sur le plan de la présentation n'engageaient pas la responsabilité civile. C'est le cas en l'espèce. Je souscris à l'opinion de la juge Otis (par. 356), selon laquelle

ce manquement à l'équité ne constitue pas une faute civile. Que le public ait su que la CNQ était mécontente 1) que l'on ait annoncé, à l'avance et de manière répétitive, la diffusion du premier reportage du 15 décembre 1994, 2) que l'on ait pu avoir l'impression que le président de l'Office des professions allait demander la mise en tutelle de la CNQ ou 3) qu'il était déplacé de référer

108

109

professions was going to ask that the CNQ be placed under trusteeship, or (3) that an inappropriate reference had been made to the notary Potiron. None of these three minor points would have justified the January 12, 1995 update. [Italics deleted; underlining added.]

110

What sets this case apart from the usual action in delict is its constitutional dimension, and the public's right to know, and the role of the press in discovering and getting the facts out into the public domain even though on occasion, as here, the presentation of the facts leaves something to be desired.

III. Disposition

111

In my view, a legal rule that awards \$673,153 in damages to Mr. Néron and his personal company on the basis of a broadcast which stated true facts, the publication of which was undoubtedly in the public interest, just because other lesser matters might also have been mentioned but were not, or further context might have been provided but was not, is simply not consistent with the public's right to know. The position adopted by the majority in this case goes well beyond what was decided in *Radio Sept-Îles* and *Prud'homme* and, with respect, will result in an unnecessary chill on the free flow of information which ought to be characteristic of a free and democratic society. The reputation of Mr. Néron and his company have undoubtedly suffered, but the real cause of their suffering was the conduct of their erstwhile client, the CNQ, which has already been held liable for the respondents' loss, and which did not appeal the question of its own liability to this Court.

112

For these reasons, I would allow the appeal with costs.

Appeal dismissed with costs, BINNIE J. dissenting.

Solicitor for the appellant: Canadian Broadcasting Corporation, Montréal.

Solicitors for the respondents: Deslauriers Jeansonne, Montréal.

au notaire Potiron n'aurait rien changé à la nature et au but du reportage. Aucun de ces trois éléments mineurs n'aurait justifié la mise au point du 12 janvier 1995. [Italiques omis; je souligne.]

Ce qui distingue la présente affaire de l'action pour délit civil habituelle est sa dimension constitutionnelle, ainsi que le droit de la population de savoir et l'obligation qu'a la presse de découvrir les faits et de les rendre publics, même s'il peut arriver, comme c'est le cas en l'espèce, que la présentation des faits laisse à désirer.

III. Dispositif

À mon avis, une règle de droit qui, à la suite d'un reportage ayant exposé des faits véridiques dont la publication était indéniablement d'intérêt public, accorde 673 153 \$ de dommages-intérêts à M. Néron et à sa société seulement parce que d'autres détails moins importants auraient dû être mentionnés mais ne l'ont pas été, ou que d'autres faits auraient dû être exposés mais ne l'ont pas été, n'est tout simplement pas conforme au droit de la population de savoir. Le point de vue adopté par les juges majoritaires en l'espèce va bien au-delà de ce qui a été décidé dans les arrêts *Radio Sept-Îles* et *Prud'homme* et aura, en toute déférence, pour effet d'entraver inutilement la libre circulation de l'information qui doit caractériser une société libre et démocratique. La réputation de M. Néron et de sa société a indéniablement été ternie, mais, en réalité, elle l'a été à cause du comportement de leur ancienne cliente, la CNQ, qui a déjà été tenue responsable de la perte des intimés et qui n'a pas contesté sa propre responsabilité devant notre Cour.

Pour ces motifs, j'accueillerais le pourvoi avec dépens.

Pourvoi rejeté avec dépens, le juge BINNIE est dissident.

Procureur de l'appelante : Société Radio-Canada, Montréal.

Procureurs des intimés : Deslauriers Jeansonne, Montréal.

*Solicitors for the intervener: Joli-Coeur, Lacasse,
Geoffrion, Jetté, St-Pierre, Montréal.*

*Procureurs de l'intervenante : Joli-Coeur,
Lacasse, Geoffrion, Jetté, St-Pierre, Montréal.*

**Morris Manning and the Church of
Scientology of Toronto** *Appellants*

v.

S. Casey Hill *Respondent*

and

**The Attorney General for Ontario, the
Canadian Civil Liberties Association, the
Writers' Union of Canada, PEN Canada,
the Canadian Association of Journalists, the
Periodical Writers Association of Canada,
the Book and Periodical Council, the
Canadian Daily Newspaper Association, the
Canadian Community Newspapers
Association, the Canadian Association of
Broadcasters, the Radio-Television News
Directors Association of Canada, the
Canadian Book Publishers' Council and the
Canadian Magazine Publishers'
Association** *Intervenors*

INDEXED AS: HILL v. CHURCH OF SCIENTOLOGY OF
TORONTO

File No.: 24216.

1995: February 20; 1995: July 20.

Present: La Forest, L'Heureux-Dubé, Gonthier, Cory,
McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
ONTARIO

Constitutional law — Charter of Rights — Application — Libel and slander — Church of Scientology commencing criminal contempt proceedings against Crown attorney — Church's counsel and representatives holding press conference on courthouse steps — Counsel reading from and commenting on allegations in contempt motion — Contempt allegations subsequently found to be untrue — Crown attorney bringing action for damages in libel — Whether Crown attorney's action for damages "government action" — Whether

**Morris Manning et l'Église de scientologie
de Toronto** *Appellants*

c.

S. Casey Hill *Intimé*

et

**Le procureur général de l'Ontario,
l'Association canadienne des libertés civiles,
Writers' Union of Canada, PEN Canada,
l'Association canadienne des journalistes,
Periodical Writers Association of Canada,
Book and Periodical Council, l'Association
canadienne des éditeurs de quotidiens,
Canadian Community Newspapers
Association, l'Association canadienne des
radiodiffuseurs, l'Association canadienne des
directeurs de l'information en radio-
télévision, Canadian Book Publishers'
Council et Canadian Magazine Publishers'
Association** *Intervenants*

RÉPERTORIÉ: HILL c. ÉGLISE DE SCIENTOLOGIE DE
TORONTO

Nº du greffe: 24216.

1995: 20 février; 1995: 20 juillet.

Présents: Les juges La Forest, L'Heureux-Dubé,
Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit constitutionnel — Charte des droits — Application — Libelle et diffamation — L'Église de scientologie institue une procédure pour outrage au criminel contre un substitut du procureur général — L'avocat et des représentants de l'Église tiennent une conférence de presse devant le palais de justice — L'avocat lit et commente des allégations contenues dans la requête pour outrage — Les allégations d'outrage se révèlent fausses par la suite — Le substitut du procureur général intente une action en dommages-intérêts pour libelle — L'action du substitut du procureur général en dommages-intérêts est-elle une «action gouvernementale»? — La

TAB 2

Charter applies — Canadian Charter of Rights and Freedoms, s. 32(1).

Libel and slander — Common law of defamation — Canadian Charter of Rights and Freedoms — Whether common law of defamation complies with values underlying Charter — Whether “actual malice” rule should be adopted.

Libel and slander — Defences — Qualified privilege — Church of Scientology commencing criminal contempt proceedings against Crown attorney — Church’s counsel and representatives holding press conference on courthouse steps — Counsel reading from and commenting on allegations in contempt motion — Contempt allegations subsequently found to be untrue — Crown attorney bringing action for damages in libel — Whether defence of qualified privilege available.

Libel and slander — Damages — General damages — Aggravated damages — Punitive damages — Church of Scientology commencing criminal contempt proceedings against Crown attorney — Church’s counsel and representatives holding press conference on courthouse steps — Counsel reading from and commenting on allegations in contempt motion — Contempt allegations subsequently found to be untrue — Crown attorney bringing action for damages in libel — Counsel and Church found jointly liable for general damages — Church found liable for aggravated and punitive damages — Whether cap should be imposed on general damages in defamation cases — Whether damage awards should stand.

The appellant M, accompanied by representatives of the appellant Church of Scientology, held a press conference on the courthouse steps. M, who was wearing his barrister’s gown, read from and commented upon allegations contained in a notice of motion by which Scientology intended to commence criminal contempt proceedings against the respondent, a Crown attorney. The notice of motion alleged that the respondent had misled a judge and had breached orders sealing certain documents belonging to Scientology. The remedy sought was the imposition of a fine or his imprisonment. At the contempt proceedings, the allegations against the respondent were found to be untrue and without foundation. He thereupon commenced an action for damages in

Charte s’applique-t-elle? — Charte canadienne des droits et libertés, art. 32(1).

Libelle et diffamation — Common law de la diffamation — Charte canadienne des droits et libertés — La common law de la diffamation est-elle conforme aux valeurs de la Charte? — Faut-il adopter la règle de la «malveillance véritable»?

Libelle et diffamation — Moyens de défense — Immunité relative — L’Église de scientologie institue une procédure pour outrage au criminel contre un substitut du procureur général — L’avocat et des représentants de l’Église tiennent une conférence de presse devant le palais de justice — L’avocat lit et commente des allégations contenues dans la requête pour outrage — Les allégations d’outrage se révèlent fausses par la suite — Le substitut du procureur général intente une action en dommages-intérêts pour libelle — La défense de l’immunité relative peut-elle être invoquée?

Libelle et diffamation — Dommages-intérêts — Dommages-intérêts généraux — Dommages-intérêts majorés — Dommages-intérêts punitifs — L’Église de scientologie institue une procédure pour outrage au criminel contre un substitut du procureur général — L’avocat et des représentants de l’Église tiennent une conférence de presse devant le palais de justice — L’avocat lit et commente des allégations contenues dans la requête pour outrage — Les allégations d’outrage se révèlent fausses par la suite — Le substitut du procureur général intente une action en dommages-intérêts pour libelle — L’avocat et l’Église sont condamnés solidairement à des dommages-intérêts généraux — L’Église est condamnée à des dommages-intérêts majorés et punitifs — Faut-il imposer un plafond aux dommages-intérêts généraux dans les affaires de diffamation? — Les montants adjugés à titre de dommages-intérêts doivent-ils être maintenus?

Accompagné de représentants de l’appelante, l’Église de scientologie, l’appelant M a tenu une conférence de presse devant le palais de justice. Vêtu de sa toge d’avocat, M a lu et commenté certaines allégations contenues dans un avis de requête par lequel Scientology souhaitait instituer une procédure pour outrage au criminel contre l’intimé, un substitut du procureur général. On y alléguait que l’intimé avait induit un juge en erreur et avait enfreint des ordonnances de mise sous scellés de certains documents appartenant à Scientology. On y réclamait la condamnation de l’intimé à une amende ou à une peine d’emprisonnement. Lors de la procédure pour outrage, les allégations visant l’intimé se sont révélées fausses et sans fondement. Il a alors intenté une

libel against the appellants. Both appellants were found jointly liable for general damages in the amount of \$300,000 and Scientology alone was found liable for aggravated damages of \$500,000 and punitive damages of \$800,000. This judgment was affirmed by the Court of Appeal. The major issues raised in this appeal are whether the common law of defamation is consistent with the *Canadian Charter of Rights and Freedoms* and whether the jury's award of damages can stand.

Held: The appeal should be dismissed.

Per La Forest, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.: The respondent's action for damages does not constitute government action within the meaning of s. 32 of the *Charter*. The fact that persons are employed by the government does not mean that their reputation is automatically divided into two parts, one related to their personal life and the other to their employment status. Reputation is an integral and fundamentally important aspect of every individual; it exists for everyone quite apart from employment. The appellants impugned the character, competence and integrity of the respondent himself, and not that of the government. He, in turn, responded by instituting legal proceedings in his own capacity. There was no evidence that the Ministry of the Attorney General or the Government of Ontario required or even requested him to do so. Neither is there any indication that the Ministry controlled the conduct of the litigation in any way. The fact that the respondent's suit may have been funded by the Ministry does not alter his constitutional status or cloak his personal action in the mantle of government action. Further, even if there were sufficient government action to bring this case within s. 32, the appellants failed to provide any evidentiary basis upon which to adjudicate their constitutional attack.

The common law must be interpreted in a manner which is consistent with *Charter* principles. This obligation is simply a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values. In its application to the parties in this action, the common law of defamation complies with the underlying values of the *Charter* and there is no need to amend or alter it. The common law strikes an appropriate balance between the twin values of reputation and freedom of expression. The protection of reputation is of vital importance, and consideration must be given to the particular significance reputation has for a lawyer. Although it is not specifically mentioned in the *Charter*,

action en dommages-intérêts pour libelle contre les appellants. Tous deux ont été condamnés solidairement à des dommages-intérêts généraux de 300 000 \$, et Scientology seule a été condamnée à payer des dommages-intérêts majorés de 500 000 \$ et des dommages-intérêts punitifs de 800 000 \$. La Cour d'appel a confirmé ce jugement. Le pourvoi soulève deux questions centrales: la common law de la diffamation est-elle conforme à la *Charte canadienne des droits et libertés* et l'adjudication des dommages-intérêts par le jury peut-elle être maintenue?

Arrêt: Le pourvoi est rejeté.

Les juges La Forest, Gonthier, Cory, McLachlin, Iacobucci et Major: L'action en dommages-intérêts intentée par l'intimé n'est pas une «action gouvernementale» au sens de l'art. 32 de la *Charte*. Le fait pour une personne de travailler pour le gouvernement ne signifie pas que sa réputation se divise automatiquement en deux moitiés, l'une reliée à sa vie privée et l'autre à son emploi. La réputation est un aspect intégral et fondamentalement important de tout individu. Elle vaut pour tous, peu importe l'emploi occupé. Les appelants ont attaqué la moralité, la compétence et l'intégrité de l'intimé, et non ceux du gouvernement. À son tour, il a répliqué en instituant une procédure judiciaire de son propre chef. Aucune preuve n'indique que le ministère du Procureur général ou le gouvernement de l'Ontario ont exigé ou même demandé qu'il le fasse, ni que le ministère veillait de quelque façon au déroulement du litige. Le fait que l'action intentée par l'intimé puisse avoir été financée par le ministère ne change rien à son statut constitutionnel, ni ne revêt son action personnelle du statut d'action gouvernementale. Par ailleurs, même s'il y avait eu action gouvernementale suffisante pour entraîner l'application de l'art. 32, les appelants n'ont pas fourni un fondement de preuve qui permettrait de résoudre leur contestation constitutionnelle.

La common law doit être interprétée d'une manière qui est conforme aux principes de la *Charte*. Cette exigence illustre simplement le pouvoir inhérent qu'ont les tribunaux de modifier ou d'élargir la common law de façon à ce qu'elle respecte les conditions et valeurs sociales contemporaines. Dans son application aux parties en l'espèce, la common law de la diffamation respecte les valeurs de la *Charte* et il n'est pas besoin de la modifier. La common law offre un juste équilibre entre les valeurs jumelles de réputation et de liberté d'expression. La protection de la réputation est d'importance vitale et il faut tenir compte de l'importance particulière que revêt la réputation pour l'avocat. Bien qu'elle ne soit pas expressément mentionnée dans la *Charte*, la

the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights. Further, reputation is intimately related to the right to privacy, which has been accorded constitutional protection. The "actual malice" rule should not be adopted in Canada in an action between private litigants. The law of defamation is not unduly restrictive or inhibiting. Freedom of speech, like any other freedom, is subject to the law and must be balanced against the essential need of individuals to protect their reputation.

Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. The legal effect of the defence of qualified privilege is to rebut the inference, which normally arises from the publication of defamatory words, that they were spoken with malice. Where the occasion is shown to be privileged, the *bona fides* of the defendant is presumed and the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff. The privilege is not absolute, however, and can be defeated if the dominant motive for publishing the statement is actual or express malice. Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes any indirect motive or ulterior purpose that conflicts with the sense of duty or the mutual interest which the occasion created. Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth. Qualified privilege may also be defeated when the limits of the duty or interest have been exceeded. The fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. The information communicated must be reasonably appropriate in the context of the circumstances existing on the occasion when that information was given.

The traditional common law rule with respect to reports on documents relating to judicial proceedings is that, where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open court, then the publication without malice of a fair and accurate report of what takes place before that tribunal is privileged. However, the common law immunity was not extended to a report on pleadings or other documents which had not been filed with the court or referred to in open court. Prior to holding the press conference M had every intention of initiating the contempt action in accordance with the prevailing rules, and had given instructions to this effect. The fact that the proper documents were not filed until the next morn-

bonne réputation de l'individu représente et reflète sa dignité inhérente, concept qui sous-tend tous les droits garantis par la *Charte*. En outre, la réputation est étroitement liée au droit à la vie privée, qui jouit d'une protection constitutionnelle. La règle de la «malveillance véritable» ne devrait pas être adoptée au Canada dans une action opposant des plaideurs privés. Le droit de la diffamation n'est pas indûment restrictif ou inhibitif. La liberté de parole, comme toute autre liberté, est assujettie à la loi et doit être mesurée en regard de la nécessité essentielle pour les individus de protéger leur réputation.

L'immunité relative se rattache aux circonstances entourant la communication, et non à la communication elle-même. La défense d'immunité relative a pour effet en droit de réfuter l'inférence, qui normalement découle de la publication de propos diffamatoires, que ceux-ci étaient motivés par la malveillance. Lorsque l'on établit qu'il y a immunité, la bonne foi du défendeur est présumée et ce dernier est alors libre de publier en toute impunité des remarques sur le demandeur, qui peuvent être diffamatoires et inexacts. Toutefois, l'immunité n'est pas absolue et peut être levée si la publication est principalement motivée par la malveillance véritable ou expresse. La malveillance s'entend dans le sens populaire de la rancune ou de l'animosité. Toutefois, elle comprend également tout motif indirect ou caché qui entre en conflit avec le sens du devoir ou l'intérêt mutuel que l'occasion a créé. On établira également l'existence de la malveillance en démontrant que le défendeur a parlé avec malhonnêteté, ou au mépris délibéré ou indifférent de la vérité. L'immunité relative peut également cesser d'exister lorsqu'on a passé outre aux limites du devoir ou de l'intérêt. L'immunité résultant d'une situation ne couvre pas nécessairement tout ce qui est dit ou écrit à cette occasion. L'information communiquée doit être raisonnablement appropriée dans les circonstances qui prévalaient lorsque l'information a été transmise.

Suivant la règle de common law traditionnelle relative à la description de documents liés à une procédure judiciaire, lorsque des procédures judiciaires sont instituées devant un tribunal légitimement constitué, qui exerce sa compétence en séance publique, la publication sans malveillance d'un compte rendu juste et exact de ce qui se passe devant ce tribunal jouit de l'immunité. L'immunité de common law n'a cependant pas été étendue aux comptes rendus d'actes de procédure ou autres documents qui n'ont pas été déposés auprès du tribunal, ni mentionnés en audience publique. Avant de tenir la conférence de presse, M avait la ferme intention d'introduire l'action pour outrage conformément aux règles qui existaient alors, et il avait donné des instructions dans ce

ing should not defeat the qualified privilege which attached to this occasion. M's conduct, however, far exceeded the legitimate purposes of the occasion. The circumstances of this case called for great restraint in the communication of information concerning the proceedings launched against the respondent. As an experienced lawyer, M ought to have taken steps to confirm the allegations that were being made. This is particularly true since he should have been aware of the Scientology investigation pertaining to access to the sealed documents. In those circumstances he was duty bound to wait until the investigation was completed before launching such a serious attack on the respondent's professional integrity. M failed to take either of these reasonable steps. As a result of this failure, the permissible scope of his comments was limited and the qualified privilege which attached to his remarks was defeated. The press conference was held on the courthouse steps in the presence of representatives from several media organizations. This constituted the widest possible dissemination of grievous allegations of professional misconduct that were yet to be tested in a court of law. His comments were made in language that portrayed the respondent in the worst possible light. This was neither necessary nor appropriate in the existing circumstances. While it is not necessary to characterize M's conduct as amounting to actual malice, it was certainly high-handed and careless and exceeded any legitimate purpose the press conference may have served. His conduct therefore defeated the qualified privilege that attached to the occasion.

When properly instructed, jurors are uniquely qualified to assess the damages suffered by the plaintiff. An appellate court is not entitled to substitute its own judgment as to the proper award for that of the jury merely because it would have arrived at a different figure. General damages in defamation cases are presumed from the very publication of the false statement and are awarded at large. It is members of the community in which the defamed person lives who will be best able to assess the damages. The jury as representative of that community should be free to make an assessment of damages which will provide the plaintiff with a sum of money that clearly demonstrates to the community the vindication of the plaintiff's reputation. No cap should be placed on general damages for defamation. First, the injury suffered by a plaintiff as a result of injurious false statements is entirely different from the non-pecuniary damages suffered by a plaintiff in a personal injury case. Second, at the time the cap was placed on non-pecuniary damages in personal injury cases, their assessment had become a very real problem for the courts and for soci-

sens. Le fait que les documents appropriés n'aient été déposés que le lendemain matin ne devrait pas écarter l'immunité relative qui s'appliquait à cette situation. Toutefois, le comportement de M a dépassé de beaucoup les objectifs légitimes de la situation. Les circonstances de l'affaire exigeaient une grande retenue dans la communication de l'information concernant les procédures lancées contre l'intimé. En avocat expérimenté, M aurait dû prendre des mesures pour confirmer les allégations qu'il allait faire, d'autant plus qu'il devait savoir que Scientology menait une enquête relativement à l'accès aux documents scellés. Dans ces circonstances, il avait le devoir d'attendre que cette investigation soit close avant de lancer contre l'intégrité professionnelle de l'intimé une attaque aussi grave. M n'a pris ni l'une ni l'autre de ces mesures raisonnables. Par suite de cette omission, la portée admissible de ses commentaires était limitée et l'immunité relative qui s'appliquait à ses remarques a cessé d'être. La conférence de presse s'est déroulée sur les marches du palais de justice en présence de représentants de plusieurs médias. Cela constituait la publication la plus vaste possible d'allégations graves d'inconduite professionnelle non encore vérifiées devant une cour de justice. Ses commentaires décrivaient l'intimé sous l'éclairage le plus sombre. Cela était inutile et inconvenant dans les circonstances. Il n'est pas nécessaire de qualifier la conduite de M de véritable malveillance, mais elle était certainement abusive et imprudente et allait au-delà de tout objectif légitime que pouvait servir la conférence de presse. Sa conduite a donc éliminé l'immunité relative qui s'appliquait à la situation.

Pourvus de directives appropriées, les jurés sont les seuls qualifiés pour évaluer le tort causé au demandeur. Le tribunal d'appel ne peut substituer sa propre opinion à celle du jury quant au montant approprié uniquement parce qu'il en serait arrivé à un montant différent. Dans les affaires de diffamation, la publication même d'une fausse déclaration crée la présomption qu'il y a lieu normalement à dommages-intérêts généraux. Ce sont les membres de la communauté dans laquelle vit la victime qui sont les mieux à même d'évaluer le préjudice. Le jury, en tant que représentant de cette communauté, doit être libre d'effectuer une évaluation des dommages-intérêts que le demandeur est fondé à recevoir et qui démontrent clairement à la communauté que sa réputation a été restaurée. On ne devrait pas imposer de maximum aux dommages-intérêts généraux accordés en matière de diffamation. Premièrement, le tort subi par un demandeur du fait de déclarations fausses et injurieuses est complètement différent des dommages non pécuniaires subis par le demandeur dans une affaire de blessures corporelles. Deuxièmement, à l'époque où le plafond a été

ety as a whole, which is not the case with libel actions. The award of \$300,000 by way of general damages was justified in this case. Both appellants published the notice of motion. All persons who are involved in the commission of a joint tort are jointly and severally liable for the damages caused by that tort, and it would thus be wrong in law to have a jury attempt to apportion liability for general damages between the joint tortfeasors. The reports in the press were widely circulated and the television broadcast had a wide coverage. The setting and the persons involved gave the coverage an aura of credibility and significance that must have influenced all who saw and read the accounts. The misconduct of the appellants continued after the first publication. Prior to the commencement of the hearing of the contempt motion, Scientology was aware that the allegations it was making against the respondent were false, yet it persisted with the contempt hearings, as did M. At the conclusion of the hearings, both appellants were aware of the falsity of the allegations. Nonetheless, when the libel action was instituted, the defence of justification was put forward by both of them. Although M withdrew the plea of justification, this was only done in the week prior to the commencement of the trial itself, and Scientology did not withdraw its plea until the hearing of the appeal. Finally, the manner in which the respondent was cross-examined by the appellants, coupled with the manner in which they presented their position to the jury, in light of their knowledge of the falsity of their allegations, are further aggravating factors to be taken into account.

Aggravated damages may be awarded in circumstances where the defendant's conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous statement. If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff. The factors that a jury may properly take into account in assessing aggravated damages include whether there was a withdrawal of the libellous statement made by the defendant and an apology tendered, whether there was a repetition of the libel, conduct that was calculated to deter the plaintiff from proceeding with the libel action, a prolonged and hostile cross-examination of the plaintiff or a plea of justification which the defendant knew was bound to fail. The general manner in which the

fixé à l'égard des dommages-intérêts non pécuniaires dans les affaires de blessures corporelles, leur évaluation était devenu un problème aigu pour les tribunaux et la société en général, ce qui n'est pas le cas des actions en libelle. Les dommages-intérêts généraux de 300 000 \$ étaient justifiés en l'espèce. Les appelants ont tous deux publié l'avis de requête. Tous ceux qui participent à la perpétration d'un délit sont solidairement responsables pour le préjudice ainsi causé. Il serait donc erroné en droit de demander au jury de répartir la responsabilité quant aux dommages-intérêts généraux entre les auteurs solidaires du délit. Les articles de presse ont été largement diffusés et le reportage télévisé a reçu une immense couverture. Le cadre et les participants ont donné à la couverture une aura de crédibilité et d'importance qui a dû influencer tous ceux qui ont vu ou lu les reportages. Les appelants ont poursuivi leur mauvaise conduite après la première publication. Avant le début de l'audition de la requête pour outrage, Scientology savait que les allégations visant l'intimé étaient fausses. Elle a quand même poursuivi l'instance relative à l'outrage, tout comme M. À l'issue de l'audition, les deux appelants savaient que les allégations étaient fausses. Pourtant, lorsque l'action en libelle a été intentée, tous deux ont invoqué la défense de justification. M n'a retiré son plaidoyer de justification que dans la semaine précédant le procès lui-même. Scientology n'a retiré son plaidoyer de justification qu'à l'audition de l'appel. Enfin, la manière dont les appelants ont contre-interrogé l'intimé, et la manière dont ils ont présenté leurs prétentions au jury, tout en sachant que leurs allégations étaient fausses, sont d'autres facteurs aggravants dont il faut tenir compte.

On peut accorder des dommages-intérêts majorés lorsque le comportement du défendeur est particulièrement abusif ou opprimant, et accroît l'humiliation et l'anxiété qu'engendre chez le demandeur la déclaration diffamatoire. Pour accorder des dommages-intérêts majorés, il faut avoir conclu que le défendeur était motivé par une malveillance véritable et a ainsi accru le préjudice subi par le demandeur, soit en propageant davantage le tort causé à sa réputation, soit en intensifiant son angoisse morale et son humiliation. Au nombre des facteurs qu'un jury est fondé à considérer en vue de fixer les dommages-intérêts majorés, il y a la question de savoir si le défendeur a retiré la déclaration diffamatoire, s'il a présenté des excuses, si le défendeur a répété le libelle, s'il s'est comporté de façon à empêcher le demandeur d'introduire l'action en libelle, s'il a fait subir au demandeur un contre-interrogatoire long et hostile, ou s'il a invoqué un plaidoyer de justification qu'il savait voué à l'échec. La manière générale dont le

defendant presented its case is also relevant. Further, it is appropriate for a jury to consider the conduct of the defendant at the time the libel was published. In this case, there was ample evidence upon which the jury could properly base their finding of aggravated damages. Every aspect of this case demonstrates the very real and persistent malice of Scientology.

Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. They should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence. Unlike compensatory damages, punitive damages are not at large, and consequently courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose, as they did in this case. Further, the circumstances presented in this exceptional case demonstrate that there was such insidious, pernicious and persistent malice that the award for punitive damages cannot be said to be excessive.

Per L'Heureux-Dubé J.: Cory J.'s reasons were generally agreed with, except with respect to the scope of the defence of qualified privilege. The common law of defamation, as it is applied to the parties in this action, is consistent with the values enshrined in the *Charter*. There is accordingly no need to amend or alter it or, in particular, to adopt the "actual malice" rule. The defence of qualified privilege, however, is not available with respect to reports of pleadings in purely private litigation upon which no judicial action has yet been taken. The defence is available only with respect to reports of judicial proceedings. While there is a right to publish details of judicial proceedings before they are heard in open court, such publication does not enjoy the protection of qualified privilege if it is defamatory.

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défendeur a présenté sa preuve est également pertinente. Par ailleurs, il convient pour un jury de considérer le comportement du défendeur à l'époque de la publication du libelle. Dans la présente affaire, il y avait une preuve abondante sur le fondement de laquelle le jury pouvait à bon droit accorder des dommages-intérêts majorés. Chaque aspect de cette affaire révèle la malveillance très réelle et constante de Scientology.

On peut accorder des dommages-intérêts punitifs lorsque la mauvaise conduite du défendeur est si malveillante, opprimante et abusive qu'elle choque le sens de dignité de la cour. Ils ne devraient être accordés que dans les situations où les dommages-intérêts généraux et majorés réunis ne permettent pas d'atteindre l'objectif qui consiste à punir et à dissuader. Contrairement aux dommages-intérêts compensatoires, les dommages-intérêts punitifs ne sont pas généralisés. En conséquence, les tribunaux disposent d'une latitude et d'une discrétion beaucoup plus grandes en appel. Le contrôle en appel devrait consister à déterminer si les dommages-intérêts punitifs servent un objectif rationnel, comme c'était le cas en l'espèce. Par ailleurs, les circonstances de cette affaire exceptionnelle démontrent qu'il y a eu une malveillance si insidieuse, pernicieuse et persistante que le montant des dommages-intérêts punitifs ne peut être jugé excessif.

Le juge L'Heureux-Dubé: L'opinion du juge Cory est substantiellement acceptée sauf en ce qui concerne la portée de la défense d'immunité relative. La common law de la diffamation, telle qu'elle s'applique aux parties à cette action, est conforme aux valeurs consacrées dans la *Charte*. Aussi n'est-il pas nécessaire de changer ou de modifier la common law, ni en particulier d'adopter la règle de la «malveillance véritable». Toutefois la défense d'immunité relative ne peut être invoquée à l'égard de comptes rendus d'actes de procédure dans le cadre de litiges purement privés, sur le fondement desquels aucune action judiciaire n'a encore été instituée. La défense d'immunité relative ne peut être invoquée que pour le compte rendu de procédures judiciaires. Il existe un droit de publier les détails de procédures judiciaires avant qu'elles soient entendues en audience publique, mais cette publication ne jouit pas de la protection de l'immunité relative si son contenu est diffamatoire.

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APPEAL from a judgment of the Ontario Court of Appeal (1994), 18 O.R. (3d) 385, 114 D.L.R. (4th) 1, 71 O.A.C. 161, 20 C.C.L.T. (2d) 129, affirming a judgment of the Ontario Court of Jus-

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1994), 18 O.R. (3d) 385, 114 D.L.R. (4th) 1, 71 O.A.C. 161, 20 C.C.L.T. (2d) 129, qui a confirmé un jugement de la Cour de Justice de

tice (General Division) awarding the respondent damages for libel against the appellants. Appeal dismissed.

Bryan Finlay, Q.C., and Christopher J. Tzekas, for the appellant Morris Manning.

Marc J. Somerville, Q.C., and R. Ross Wells, for the appellant the Church of Scientology of Toronto.

Robert P. Armstrong, Q.C., and Kent E. Thomson, for the respondent.

Lori Sterling and Hart Schwartz, for the intervenor the Attorney General for Ontario.

Robert J. Sharpe and Kent Roach, for the intervenor the Canadian Civil Liberties Association.

Edward M. Morgan, for the interveners the Writers' Union of Canada, PEN Canada, the Canadian Association of Journalists, the Periodical Writers Association of Canada, and the Book and Periodical Council.

Peter W. Hogg, Q.C., and Brian MacLeod Rogers, for the interveners the Canadian Daily Newspaper Association, the Canadian Community Newspapers Association, the Canadian Association of Broadcasters, the Radio-Television News Directors Association of Canada, the Canadian Book Publishers' Council and the Canadian Magazine Publishers' Association.

The judgment of La Forest, Gonthier, Cory, McLachlin, Iacobucci and Major JJ. was delivered by

l'Ontario (Division générale) condamnant les appelants à verser à l'intimé des dommages-intérêts pour libelle. Pourvoi rejeté.

Bryan Finlay, c.r., et Christopher J. Tzekas, pour l'appellant Morris Manning.

Marc J. Somerville, c.r., et R. Ross Wells, pour l'appelante l'Église de scientologie de Toronto.

Robert P. Armstrong, c.r., et Kent E. Thomson, pour l'intimé.

Lori Sterling et Hart Schwartz, pour l'intervenant le procureur général de l'Ontario.

Robert J. Sharpe et Kent Roach, pour l'intervenante l'Association canadienne des libertés civiles.

Edward M. Morgan, pour les intervenants Writers' Union of Canada, PEN Canada, l'Association canadienne des journalistes, Periodical Writers Association of Canada, et Book and Periodical Council.

Peter W. Hogg, c.r., et Brian MacLeod Rogers, pour les intervenants l'Association canadienne des éditeurs de quotidiens, Canadian Community Newspapers Association, l'Association canadienne des radiodiffuseurs, l'Association canadienne des directeurs de l'information en radio-télévision, Canadian Book Publishers' Council et Canadian Magazine Publishers' Association.

Version française du jugement des juges La Forest, Gonthier, Cory, McLachlin, Iacobucci et Major rendu par

CORY J. — On September 17, 1984, the appellant Morris Manning, accompanied by representatives of the appellant Church of Scientology of Toronto ("Scientology"), held a press conference on the steps of Osgoode Hall in Toronto. Manning, who was wearing his barrister's gown, read from and commented upon allegations contained in a notice of motion by which Scientology intended to commence criminal contempt proceedings against the respondent Casey Hill, a Crown attorney. The

LE JUGE CORY — Le 17 septembre 1984, accompagné de représentants de l'appelante, l'Église de scientologie de Toronto («Scientologie»), l'appellant Morris Manning a tenu une conférence de presse devant Osgoode Hall à Toronto. Vêtu de sa toge d'avocat, il a lu et commenté certaines allégations contenues dans un avis de requête par lequel Scientologie souhaitait instituer une procédure pour outrage au criminel contre l'intimé Casey Hill, substitut du procureur général. On

notice of motion alleged that Casey Hill had misled a judge of the Supreme Court of Ontario and had breached orders sealing certain documents belonging to Scientology. The remedy sought was the imposition of a fine or the imprisonment of Casey Hill.

y alléguait que Casey Hill avait induit en erreur un juge de la Cour suprême de l'Ontario et avait enfreint des ordonnances de mise sous scellés de certains documents appartenant à Scientology. On y réclamait également la condamnation de Casey Hill à une amende ou à une peine d'emprisonnement.

At the contempt proceedings, the allegations against Casey Hill were found to be untrue and without foundation. Casey Hill thereupon commenced this action for damages in libel against both Morris Manning and Scientology. On October 3, 1991, following a trial before Carruthers J. and a jury, Morris Manning and Scientology were found jointly liable for general damages in the amount of \$300,000 and Scientology alone was found liable for aggravated damages of \$500,000 and punitive damages of \$800,000. Their appeal from this judgment was dismissed by a unanimous Court of Appeal: (1994), 18 O.R. (3d) 385, 114 D.L.R. (4th) 1, 71 O.A.C. 161, 20 C.C.L.T. (2d) 129.

Lors de la procédure pour outrage, les allégations visant Casey Hill se sont révélées fausses et sans fondement. Casey Hill a alors intenté une action en dommages-intérêts pour libelle contre Morris Manning et Scientology. Le 3 octobre 1991, au terme d'un procès devant le juge Carruthers et un jury, Morris Manning et Scientology ont été condamnés solidairement à des dommages-intérêts généraux de 300 000 \$, et Scientology seule a été condamnée à payer des dommages-intérêts majorés de 500 000 \$ et des dommages-intérêts punitifs de 800 000 \$. La Cour d'appel a rejeté à l'unanimité leur appel de ce jugement: (1994), 18 O.R. (3d) 385, 114 D.L.R. (4th) 1, 71 O.A.C. 161, 20 C.C.L.T. (2d) 129.

I. Factual Background

As in all actions for libel, the factual background is extremely important and must be set out in some detail. At the time the defamatory statements were made, Casey Hill was employed as counsel with the Crown Law Office, Criminal Division of the Ministry of the Attorney General for the Province of Ontario. He had given advice to the Ontario Provincial Police ("OPP") regarding a warrant obtained on March 1, 1983 which authorized a search of the premises occupied by Scientology. During the execution of the search warrant on March 3 and 4, 1983, approximately 250,000 documents, comprising over 2 million pages of material, were seized. These documents were stored in some 900 boxes at an OPP building in Toronto.

I. Historique des faits

Comme dans toute action pour libelle, le contexte factuel est extrêmement important et doit être exposé dans les détails. Au moment où les propos diffamatoires ont été tenus, Casey Hill était avocat au Bureau des avocats de la Couronne — Droit criminel, au ministère du Procureur général pour la province d'Ontario. Il avait conseillé la Police provinciale de l'Ontario («PPO») relativement à un mandat obtenu le 1^{er} mars 1983, autorisant la fouille des locaux de Scientology. Au cours de l'exécution du mandat de perquisition les 3 et 4 mars 1983, approximativement 250 000 documents représentant plus de 2 millions de pages ont été saisis puis emmagasinés dans quelque 900 boîtes dans un édifice appartenant à la PPO à Toronto.

Immediately following the seizure, Scientology retained Clayton Ruby to bring a motion to quash the search warrant and to seek the return of the seized documents. Casey Hill, who had gained

Immédiatement après la saisie, Scientology a retenu les services de Clayton Ruby pour présenter une requête en annulation du mandat de perquisition et demander la remise des documents saisis. Casey Hill, qui avait acquis une certaine expérience et une compétence particulière dans le

experience and special skill in the area of search and seizure, acted as counsel for the Crown.

domaine des fouilles, des perquisitions et des saisies, agissait pour le ministère public.

5 The litigation commenced on March 7, 1983 and continued throughout 1983 and 1984. On July 11, 1984, Osler J. ruled that solicitor-and-client privilege applied to 232 of the seized documents he had reviewed and ordered that they remain sealed pending further order of the court. Several sealing orders and endorsements were ultimately made by Justices of the Supreme Court of Ontario.

Engagée le 7 mars 1983, la procédure s'est poursuivie tout au long de 1983 et 1984. Le 11 juillet 1984, ayant statué que le privilège du secret professionnel de l'avocat s'appliquait à 232 des documents saisis qu'il avait examinés, le juge Osler a ordonné qu'ils demeurent scellés jusqu'à nouvelle ordonnance de la cour. Plusieurs ordonnances et jugements de mise sous scellés ont par la suite été rendus par des juges de la Cour suprême de l'Ontario.

6 Throughout this period, Casey Hill dealt frequently with Clayton Ruby and other counsel for Scientology in connection with various matters ranging from the trivial to the significant. They were invariably resolved in a spirit of co-operation and professional courtesy, even in those situations where the parties proceeded with contested motions.

Pendant ce temps, Casey Hill a traité fréquemment avec Clayton Ruby et d'autres avocats de Scientology relativement à diverses questions, certaines importantes, d'autres moins. Elles ont invariablement été résolues dans un esprit de collaboration et de courtoisie professionnelle, même lorsqu'il s'agissait de requêtes contestées.

7 In March of 1983, Scientology retained Charles Campbell to make an application to Rosemarie Drapkin, the Deputy Registrar General of the Ministry of Consumer and Commercial Relations, requesting that its president, Earl Smith, be granted the authorization to solemnize marriages pursuant to s. 20(2) of the *Marriage Act*, R.S.O. 1980, c. 256. One year later, Scientology commenced an application for judicial review of Rosemarie Drapkin's failure to approve that application.

En mars 1983, Scientology a retenu les services de Charles Campbell pour présenter à Rosemarie Drapkin, registraire général adjoint au ministère de la Consommation et du Commerce, une demande visant à ce que son président Earl Smith soit autorisé à célébrer le mariage conformément au par. 20(2) de la *Loi sur le mariage*, L.R.O. 1980, ch. 256. Un an plus tard, Scientology a présenté une demande de contrôle judiciaire relativement à l'omission par Rosemarie Drapkin d'agréer à la demande.

8 Rosemarie Drapkin believed that it would help her to assess the application if she could review the seized documents. To that end, Kim Twohig, a solicitor in the Civil Division of the Crown Law Office, approached Casey Hill in July 1984. He advised her that there was a motion outstanding before Osler J. for an order quashing the search warrant and that access would only be granted if a court order was obtained pursuant to s. 490(15) (formerly 446(15)) of the *Criminal Code*, R.S.C., 1985, c. C-46. He explained that there had been several interim rulings in this matter and stated that "this was probably the type of case where the

Rosemarie Drapkin estimait que, pour évaluer la demande, il lui serait utile d'examiner les documents saisis. À cette fin, Kim Twohig, procureur au Bureau des avocats de la Couronne — Droit civil, a communiqué avec Casey Hill en juillet 1984. Ce dernier l'a informée qu'une requête non encore tranchée avait été soumise au juge Osler en vue d'annuler le mandat de perquisition et que l'accès ne serait autorisé que si une ordonnance de la cour était obtenue conformément au par. 490(15) (auparavant 446(15)) du *Code criminel*, L.R.C. (1985), ch. C-46. Il a expliqué que plusieurs décisions intérimaires avaient été rendues

judge hearing such an application would want notice given to Scientology”.

During the last week of July 1984, Casey Hill travelled to Nassau to meet with the Attorney General of the Bahamas in respect of an ongoing criminal investigation. In the course of a telephone conversation, Kim Twohig conveyed to Casey Hill the urgent need she had to gain access to the documents as a date had been fixed to hear Scientology’s application for judicial review. Casey Hill testified that he told Kim Twohig that her *Criminal Code* application would have to be served on the Crown Law Office, Criminal Division in the usual fashion to obtain its consent.

Kim Twohig prepared the necessary materials, including the notice of motion and an affidavit of Rosemarie Drapkin, and obtained the requisite consent from James Blacklock of the Crown Law Office, Criminal Division. The application was then filed in Weekly Court on July 30, 1984 with the assistance of Jerome Cooper, a solicitor with the Ministry of Consumer and Commercial Relations. No notice was given to Scientology. The following day, a consent order granting access to all of the seized documents was issued by Sirois J. in chambers without submissions from counsel.

In her testimony at the trial of this action, Kim Twohig agreed that she alone made the decision not to provide notice to Scientology of her application. She testified that she assumed that the presiding judge would determine whether notice was necessary or appropriate. It was only later that she realized that the order of Sirois J. might provide access to sealed documents.

By letter dated August 22, 1984, Rosemarie Drapkin wrote to Charles Campbell concerning Scientology’s application and advised that she had “reviewed certain documents relating to the Scientology organization which were seized pursuant to the search warrant” issued on March 1,

sur cette question et déclaré qu’il [TRADUCTION] «s’agit probablement d’un cas où le juge saisi de la demande exigerait qu’on avise Scientology».

Au cours de la dernière semaine de juillet 1984, Casey Hill s’est rendu à Nassau pour y rencontrer le Procureur général des Bahamas relativement à une enquête en cours au criminel. Au cours d’une conversation téléphonique, Kim Twohig a informé Casey Hill qu’il était urgent pour elle d’obtenir accès aux documents parce qu’une date avait été fixée pour l’audition de la demande de contrôle judiciaire présentée par Scientology. Casey Hill a témoigné avoir informé Kim Twohig que sa demande fondée sur le *Code criminel* devrait être signifiée de la manière habituelle au Bureau des avocats de la Couronne — Droit criminel, en vue d’obtenir un consentement.

Kim Twohig a rédigé les documents nécessaires, dont l’avis de requête et un affidavit de Rosemarie Drapkin, et a obtenu le consentement requis de James Blacklock du Bureau des avocats de la Couronne — Droit criminel. Le 30 juillet 1984, la demande a été déposée à la cour des sessions hebdomadaires avec l’aide de Jerome Cooper, procureur au ministère de la Consommation et du Commerce. Aucun avis n’a été donné à Scientology. Le lendemain, sans entendre les arguments des avocats, le juge Sirois en son cabinet a rendu une ordonnance sur consentement accordant l’accès à tous les documents saisis.

Dans son témoignage au procès relatif à la présente action, Kim Twohig a reconnu qu’elle avait pris seule la décision de ne pas donner avis de sa demande à Scientology. Elle a présumé que le juge présidant l’audience déterminerait si l’avis était nécessaire ou approprié. C’est plus tard seulement qu’elle s’est rendu compte que l’ordonnance du juge Sirois pouvait autoriser l’accès à des documents scellés.

Dans une lettre du 22 août 1984, Rosemarie Drapkin a écrit à Charles Campbell au sujet de la demande présentée par Scientology et lui a dit avoir [TRADUCTION] «examiné certains documents concernant la structure de Scientology, saisis conformément au mandat de perquisition» délivré le

1983. Attached to the letter was a list of 89 documents, some of which had purportedly been sealed by order of Osler J. It was this information which raised the concern of Scientology and its legal advisers.

1^{er} mars 1983. À la lettre était jointe une liste de 89 documents, dont certains auraient apparemment été scellés par ordonnance du juge Osler. C'est cette information qui préoccupait Scientology et ses conseillers juridiques.

13 In response, Clayton Ruby wrote a somewhat precipitous and very aggressive letter to the Solicitor General of Ontario dated August 28, 1984. In it he accused the OPP of acting "as if there were no rule of law" and of "simply ignoring solicitor/client privilege and making a mockery of the courts". He called for a "full investigation" and demanded disciplinary action be taken "against everyone involved". Clayton Ruby was not aware of the order of Sirois J. at that time. He simply assumed that those involved had acted improperly.

En réponse, Clayton Ruby a écrit une lettre quelque peu précipitée et fort agressive au solliciteur général de l'Ontario le 28 août 1984. Il y accusait la PPO de [TRADUCTION] «faire fi de la primauté du droit, [d']ignorer complètement le privilège du secret professionnel de l'avocat et de ridiculiser les tribunaux». Il réclamait une «enquête exhaustive» et des mesures disciplinaires «contre toutes les personnes concernées». Clayton Ruby ignorait à ce moment-là l'existence de l'ordonnance rendue par le juge Sirois. Il avait simplement présumé que les personnes concernées avaient agi irrégulièrement.

14 As early as September 5, 1984, Clayton Ruby, along with other counsel and representatives of Scientology, decided that what had occurred was "disgraceful and shocking" and constituted contempt. They arrived at this conclusion without having taken any steps to ensure the accuracy of their impressions.

Dès le 5 septembre 1984, Clayton Ruby, ainsi que d'autres avocats et représentants de Scientology, ont décidé que ce qui était arrivé était [TRADUCTION] «honteux et choquant» et constituait un outrage. Ils sont arrivés à cette conclusion sans s'être assurés d'abord du bien-fondé de leurs impressions.

15 In a letter addressed to Casey Hill dated September 6, 1984, Clayton Ruby asked for Casey Hill's assistance in obtaining information regarding the circumstances under which the order of Sirois J. had been granted and why Scientology had not received notice of the application. He requested a response within five days. It should be noted that at the time this letter was written, Clayton Ruby was a Bencher of the Law Society and Vice-Chairman of the Law Society's Discipline Committee.

Dans une lettre du 6 septembre 1984, Clayton Ruby a demandé l'aide de Casey Hill pour obtenir des renseignements sur les circonstances dans lesquelles l'ordonnance du juge Sirois avait été rendue et la raison pour laquelle Scientology n'avait pas été avisée de la demande. Il exigeait une réponse dans les cinq jours. Il y a lieu de signaler qu'à l'époque où la lettre a été écrite, Clayton Ruby était conseiller de la Société du barreau et vice-président du comité de discipline de la Société du barreau.

16 The letter implied that there could be disciplinary proceedings brought before the Law Society of Upper Canada and that a contempt action might be instituted. Not surprisingly, it was given serious consideration by Casey Hill and others at the Ministry of the Attorney General. Hill sought the advice of his Director, Howard Morton. Morton wrote a letter to Ruby stating that in light of the serious nature of the allegations, he would not be

La lettre laissait supposer la possibilité que soit instituée, d'une part, une procédure disciplinaire devant la Société du barreau du Haut-Canada, et d'autre part une action pour outrage. Il va de soi que Casey Hill et les autres intervenants du ministère du Procureur général ont pris la chose très au sérieux. Hill a demandé conseil à son directeur Howard Morton, qui a écrit à Ruby que, compte tenu de la gravité des allégations, il ne serait pas en

able to reply within the five-day period imposed by Ruby.

On September 6 and 7, 1984, Michael Code (then an associate of Clayton Ruby) telephoned Casey Hill, Jerome Cooper and Kim Twohig to find out how access to the privileged documents had been obtained. They all conveyed a similar version of the past events and assured him that the sealed documents were not opened but rather that unsealed copies must have been examined. Code conceded in cross-examination that everyone he spoke to was cooperative.

On September 11, 1984, however, without making any further inquiries and without awaiting the reply from Casey Hill and Howard Morton, Ruby retained the appellant Morris Manning to advise Scientology in respect of possible contempt proceedings. On September 13, 1984, representatives of Scientology met with Morris Manning, Charles Campbell, Clayton Ruby, Michael Code and an articling student at Ruby's office. A decision was made to commence an application for criminal contempt against both Casey Hill and Jerome Cooper. Morris Manning testified that a critical piece of information which prompted him to bring the contempt application was the characterization by Michael Code of Casey Hill's attitude during their conversation. Casey Hill had allegedly said that if the Church missed sealing all copies of the privileged documents it was "too bad". In Morris Manning's opinion, this demonstrated a contemptuous attitude towards the court. He reached this conclusion without ever speaking to Casey Hill or any of the others involved in the incident such as Rosemarie Drapkin, Kim Twohig, James Blacklock, Jerome Cooper or Detective Inspector Ormsby, the senior officer of the OPP responsible for the investigation of Scientology. Nor had Morris Manning interviewed those representatives of Scientology who were directly involved in the sealing of the documents.

The evidence adduced at the contempt hearing clearly established that Casey Hill played no part in the application before Sirois J. and had nothing to do with the execution or filing of the consent on

mesure de répondre dans le délai prescrit de cinq jours.

Les 6 et 7 septembre 1984, Michael Code (alors associé de Clayton Ruby) a appelé Casey Hill, Jerome Cooper et Kim Twohig pour savoir comment l'accès aux documents protégés avait été obtenu. Ils ont tous donné une version semblable des événements passés et lui ont assuré que les documents scellés n'avaient pas été ouverts, affirmant que c'était plutôt les copies non scellées qui devaient avoir été examinées. Code a concédé en contre-interrogatoire que tous ceux à qui il avait parlé s'étaient montrés coopératifs.

Le 11 septembre 1984, toutefois, sans se renseigner plus avant et sans attendre la réponse de Casey Hill et de Howard Morton, Ruby a retenu les services de Morris Manning pour conseiller Scientology relativement à une éventuelle procédure pour outrage. Le 13 septembre 1984, les représentants de Scientology, Morris Manning, Charles Campbell, Clayton Ruby, Michael Code et un stagiaire se sont réunis au bureau de Ruby. Ils ont alors décidé d'intenter une action pour outrage au criminel contre Casey Hill et Jerome Cooper. Morris Manning a témoigné que l'élément d'information capital qui l'avait amené à intenter l'action pour outrage était la description donnée par Michael Code de l'attitude de Casey Hill pendant leur conversation. Casey Hill aurait dit que c'était [TRADUCTION] «tant pis» si Scientology n'avait pas scellé toutes les copies des documents protégés. Morris Manning estimait que cela révélait une attitude outrageante envers la cour. Il a tiré cette conclusion sans jamais parler à Casey Hill ni à aucune autre personne concernée, comme Rosemarie Drapkin, Kim Twohig, James Blacklock, Jerome Cooper ou le sergent détective Ormsby, officier supérieur de la PPO chargé de mener l'enquête sur Scientology. Morris Manning n'a pas interrogé non plus les représentants de Scientology qui avaient directement participé à la mise sous scellé des documents.

La preuve produite lors de l'audition sur l'outrage a permis d'établir clairement que Casey Hill n'avait joué aucun rôle dans la demande présentée au juge Sirois et n'avait rien à voir avec l'exécu-

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behalf of the Attorney General for Ontario. In fact, he was only informed of any difficulties associated with the order of Osler J. in late August 1984, when he received a telephone call from Detective Inspector Ormsby. At that time, Ormsby advised him that Rosemarie Drapkin had attended at the OPP building in which the seized documents were held with the order of Sirois J., but that she was denied access to the sealed documents. The sealed documents were never opened. What Rosemarie Drapkin may have seen were unsealed copies of the sealed documents that were probably located in different boxes than the sealed originals.

tion ou le dépôt du consentement au nom du procureur général de l'Ontario. En fait, il n'a été informé des difficultés liées à l'ordonnance du juge Osler qu'à la fin août 1984, quand il a reçu un appel du sergent détective Ormsby. Ce dernier l'a alors informé que, munie de l'ordonnance du juge Sirois, Rosemarie Drapkin s'était présentée à l'immeuble de la PPO où les documents saisis étaient conservés, mais qu'on lui avait refusé l'accès aux documents scellés. Ceux-ci n'ont jamais été ouverts. Rosemarie Drapkin a pu voir des copies non scellées des documents scellés, probablement placées dans d'autres boîtes que les originaux scellés.

20 Between September 13 and 17, 1984, Morris Manning prepared a notice of motion for the contempt application returnable in Weekly Court some time in early January 1985. During this time, he did not make any attempt to determine what was being done with the seized documents or to ascertain whether any continuing breach of privilege was occurring.

Entre le 13 et le 17 septembre 1984, Morris Manning a rédigé un avis de requête relativement à l'action pour outrage, à présenter devant la cour des sessions hebdomadaires au début du mois de janvier 1985. Pendant ce temps, il n'a jamais tenté de connaître le sort des documents saisis ni de vérifier si l'on violait le privilège de façon continue.

(A) *The "Enemy Canada" File*

(A) *Le dossier «ennemi Canada»*

21 Long before he gave advice to the OPP in connection with the search and seizure of documents which took place on March 3 and 4, 1983, Casey Hill had become a target of Scientology's enmity. Over the years, he had been involved in a number of matters concerning Scientology's affairs. As a result, it kept a file on him. This was only discovered when the production of the file was ordered during the course of this action. The file disclosed that from approximately 1977 until at least 1981, Scientology closely monitored and tracked Casey Hill and had labelled him an "Enemy Canada". Casey Hill testified that from his experience, persons viewed by Scientology as its enemies were "subject to being neutralized".

Bien avant d'avoir conseillé la PPO relativement à la perquisition et à la saisie des documents, survenues les 3 et 4 mars 1983, Casey Hill était devenu la cible de l'hostilité de Scientology. Au fil des ans, il avait travaillé dans plusieurs affaires concernant Scientology. Celle-ci a donc assemblé un dossier sur lui, fait qui a été découvert seulement lorsque la production du dossier a été ordonnée au cours de l'action. Le dossier révélait qu'à partir de 1977 environ jusqu'à 1981 au moins, Scientology avait étroitement surveillé et suivi Casey Hill et l'avait désigné comme «ennemi Canada». Casey Hill a témoigné que, selon son expérience, les personnes que Scientology considère ses ennemis sont «susceptibles d'être neutralisées».

(B) *The Press Conference*

(B) *La conférence de presse*

22 In the file of Charles Campbell there was a note dated September 10 or 11, 1984 which made reference to a press conference to be held the following Monday, September 17, 1984. It appears, then, that

Le dossier de Charles Campbell contenait une note datée du 10 ou du 11 septembre 1984, où il était question de la conférence de presse qui devait se tenir le lundi suivant, soit le 17 septembre 1984.

before it had even consulted Morris Manning, Scientology intended to call a press conference

Il appert qu'avant même d'avoir consulté Morris Manning, Scientologie avait l'intention de tenir une conférence de presse.

The press conference was organized by Earl Smith. He contacted a number of media organizations, including CFTO-TV, CBC television and *The Globe and Mail* and invited them to the event which was to be held in front of Osgoode Hall. Morris Manning was appearing on that day before the Court of Appeal in an unrelated matter and attended the press conference in his barrister's gown.

Earl Smith s'est chargé d'organiser la conférence de presse. Il a communiqué avec différents médias, dont CFTO-TV, CBC et *The Globe and Mail*, et les a invités à l'événement qui devait se tenir devant Osgoode Hall. Morris Manning comparait ce même jour devant la Cour d'appel dans une autre affaire et portait sa toge d'avocat à la conférence de presse.

He testified that he answered a number of questions concerning the contempt proceedings and then, at the request of the media, read a passage from the notice of motion for the television cameras. Copies of the notice of motion were distributed to the media along with a typewritten document, prepared by Scientology, entitled "Chronology of Events Leading to Contempt Motion".

Il a témoigné avoir répondu à un certain nombre de questions sur la procédure pour outrage et, à la demande des médias, avoir lu un passage de l'avis de requête pour le bénéfice des caméras de la télévision. Des copies de l'avis de requête ont été distribuées aux médias avec un document de Scientologie, intitulé [TRADUCTION] «Chronologie des événements ayant mené à la requête pour outrage».

The notice of motion in essence alleged that Casey Hill had participated in the misleading of Sirois J. and that he had participated in or aided and abetted others in the opening and inspection of documents which to his knowledge were sealed by Osler J.

L'avis de requête alléguait essentiellement que Casey Hill avait contribué à induire le juge Sirois en erreur et avait participé ou avait aidé ou encouragé d'autres personnes à procéder à l'ouverture et à l'inspection de documents qu'il savait avoir été scellés par le juge Osler.

On the evening of September 17, 1984, the CFTO broadcast was seen by an audience of approximately 132,000 people. The text of the broadcast is set out in Appendix A to these reasons. The CBC broadcast was seen by approximately 118,000 people. The text is found in Appendix B. The following morning, an article appeared in *The Globe and Mail* entitled "Motion of Contempt Launched by Church". Approximately 108,000 copies of the edition containing this article were distributed. The article is reproduced in Appendix C. All three publications repeated the allegations made in the notice of motion.

Le 17 septembre 1984 en soirée, le reportage de CFTO a été vu par environ 132 000 personnes. Le texte du reportage est reproduit à l'annexe A des présents motifs. Le reportage diffusé par CBC, dont le texte figure à l'annexe B, a été vu par environ 118 000 personnes. Le lendemain matin, un article est paru dans *The Globe and Mail*, intitulé [TRADUCTION] «Une Église intente une action pour outrage». Environ 108 000 exemplaires de l'édition contenant cet article ont été distribués. L'article est reproduit à l'annexe C. Les trois reportages reprenaient les allégations contenues dans l'avis de requête.

*(C) The Felske Memorandum**(C) Le mémoire de Felske*

27

Patricia Felske is a Scientologist who had attended at the offices of the OPP on a regular basis since March 1983 for the purpose of reviewing the seized materials and ensuring that the privileged documents were sealed. Between August 29, 1984, and September 27, 1984, she, along with other representatives from Scientology, opened the sealed envelopes and verified their contents against photocopies of the documents that Rosemarie Drapkin had examined. Their purpose was to determine whether Ms. Drapkin had been granted access to the restricted materials.

Patricia Felske, une adepte de la scientologie, s'était présentée régulièrement aux bureaux de la PPO depuis mars 1983 dans le but d'examiner les documents saisis et de s'assurer que les documents protégés étaient scellés. Entre le 29 août 1984 et le 27 septembre 1984, elle et d'autres représentants de Scientologie ont ouvert les enveloppes scellées pour en vérifier le contenu et le comparer aux photocopies des documents que Rosemarie Drapkin avait examinés. Ils cherchaient à déterminer si M^{me} Drapkin avait obtenu accès aux documents confidentiels.

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On September 17, 1984, the day of the press conference, the Scientology investigation was well advanced and neither then nor later was there any indication that Drapkin gained access to sealed documents. Scientology and Manning nevertheless proceeded with the press conference before any conclusive findings had been made on this issue.

Le 17 septembre 1984, le jour de la conférence de presse, les recherches de Scientologie étaient très avancées et, ni à ce moment-là, ni par la suite, n'y a-t-il eu d'indication que Drapkin avait eu accès aux documents protégés. Scientologie et Manning ont tout de même tenu la conférence de presse avant que des conclusions déterminantes soient tirées à cet égard.

29

On November 2, 1984, Patricia Felske prepared a brief summary of her findings, entitled "Time Track Re: Solicitor and Client Privileged Documents", which she sent to Clayton Ruby, Charles Campbell, Morris Manning and Diane Martin, another of Scientology's lawyers. In it she concluded that "[t]here was no evidence to support any allegation that the sealed envelopes had been tampered with by the OPP" (emphasis added).

Le 2 novembre 1984, Patricia Felske a rédigé un bref résumé de ses conclusions intitulé [TRADUCTION] «Chronologie concernant les documents protégés par le secret professionnel», qu'elle a fait parvenir à Clayton Ruby, Charles Campbell, Morris Manning et Diane Martin, une autre avocate de Scientologie. Elle y concluait qu'[TRADUCTION] «[i]l n'existe aucune preuve appuyant une quelconque allégation que la PPO a altéré les enveloppes scellées» (je souligne).

*(D) The Contempt Trial**(D) L'action pour outrage*

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The contempt trial was heard by Cromarty J. for 11 days beginning the next Monday, November 5, 1984. Morris Manning and Charles Campbell had carriage of the proceedings on behalf of Scientology. A number of witnesses were called by them, including Clayton Ruby, Michael Code, Kim Twohig, Rosemarie Drapkin, James Blacklock, Detective Inspector Ormsby and four other members of the OPP who had direct responsibility for the seized documents.

Le procès pour outrage, tenu devant le juge Cromarty, a commencé le lundi suivant, soit le 5 novembre 1984, et a duré 11 jours. Morris Manning et Charles Campbell y agissaient pour le compte de Scientologie. Ils ont appelé un certain nombre de témoins, dont Clayton Ruby, Michael Code, Kim Twohig, Rosemarie Drapkin, James Blacklock, le sergent détective Ormsby et quatre autres membres de la PPO sous la responsabilité directe desquels se trouvaient les documents saisis.

Following the presentation of Scientology's case, Cromarty J. dismissed the application on a motion for non-suit on December 7, 1984: 13 W.C.B. 231. He held that there was no evidence that Casey Hill participated in any stage of the application made before Sirois J. or that he should have been aware of any need for further inquiry into Kim Twohig's actions.

From the contents of the Felske Memorandum, which only came to light at the trial of the present action, it is evident that prior to the start of the contempt hearing, Scientology was well aware that no sealed envelopes had been opened. Yet, it still proceeded with a contempt prosecution against Casey Hill.

Morris Manning testified that he never received the Felske Memorandum and conceded that if he had been aware of it, he would have been obliged to disclose it to Casey Hill. However, on the week-end prior to the start of the contempt trial, Morris Manning was briefed by Charles Campbell. At trial, both Campbell and Ruby acknowledged that they had received the Felske Memorandum. In addition, Campbell testified that all important information concerning the prosecution was shared with everybody involved. It might be inferred that this would include Manning.

Further, Morris Manning met with Patricia Felske and two other representatives of Scientology during the weekend prior to the hearing of the contempt motion. However, he testified that they were not interviewed for the purpose of giving evidence at the contempt trial nor were they called to do so. Cromarty J. characterized the failure to call these individuals as "a most eloquent omission".

There was another equally eloquent omission. The OPP officers who were called by Scientology to testify were not asked to produce the sealed envelopes they were directed to bring with them to court. If they had, it would have been obvious that the envelopes had not been tampered with.

Au terme de la présentation de la preuve par Scientologie, le juge Cromarty a rejeté la demande sur une motion en non-lieu le 7 décembre 1984: 13 W.C.B. 231. Il n'y avait à son avis aucune preuve que Casey Hill avait participé à quelque étape que ce soit de la demande présentée devant le juge Sirois ou qu'il aurait dû savoir qu'il fallait se renseigner davantage sur les actes de Kim Twohig.

D'après le contenu du mémoire de Felske, dévoilé au procès de la présente action, il est évident qu'avant le début de l'audition relative à l'outrage, Scientologie savait très bien qu'aucune enveloppe scellée n'avait été ouverte et avait pourtant intenté l'action pour outrage contre Casey Hill.

Morris Manning a témoigné n'avoir jamais reçu le mémoire de Felske et concédé que s'il en avait été informé, il aurait été tenu de le révéler à Casey Hill. Toutefois, le week-end précédant le procès pour outrage, Morris Manning a été mis au courant par Charles Campbell. Au procès, Campbell et Ruby ont tous deux reconnu avoir reçu le mémoire de Felske. De même, Campbell a témoigné que tous les renseignements importants concernant la poursuite étaient connus de tous les participants. On peut présumer que Manning était de ceux-là.

Par ailleurs, Morris Manning a rencontré Patricia Felske et deux autres représentants de Scientologie au cours du week-end qui a précédé l'audition de la requête pour outrage. Il a cependant témoigné qu'il ne les avait pas rencontrés dans le but de les faire témoigner au procès pour outrage et qu'ils n'ont pas été appelés à le faire. Le juge Cromarty a qualifié cette omission [TRADUCTION] «de fort éloquente».

Une autre omission tout aussi révélatrice a été commise. On n'a pas demandé aux agents de la PPO appelés par Scientologie à témoigner, de produire les enveloppes scellées qu'ils avaient dû apporter à la cour. Si on leur avait demandé, il serait devenu évident que les enveloppes n'avaient pas été altérées.

(E) *The Attempt to Disqualify Casey Hill from the Search and Seizure Proceedings*

(E) *La tentative de rendre Casey Hill inhabile à agir dans l'instance relative à la fouille, à la perquisition ou à la saisie abusive*

36

As stated earlier, Scientology made an application in March 1983 to quash the search warrant which the OPP had used to seize its documents. This application was commenced before Osler J. prior to September 17, 1984, but was adjourned until the completion of the contempt proceedings. Throughout this time, Casey Hill represented the Crown as lead counsel.

Ainsi qu'il a été mentionné précédemment, Scientologie a présenté en mars 1983 une demande d'annulation du mandat de perquisition utilisé par la PPO pour saisir ses documents. Cette demande a été instituée devant le juge Osler le 17 septembre 1984, mais a été ajournée jusqu'à l'issue de l'action pour outrage. Pendant tout ce temps, Casey Hill a agi comme avocat principal pour le compte du ministère public.

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The application was resumed on December 18, 1984. By that time, the contempt charges had been dismissed as unfounded and this libel action had been commenced. Casey Hill continued to represent the Crown but made a full disclosure of all the relevant circumstances to Osler J. He submitted that the proceedings involved the interpretation and application of legal principles rather than the exercise of prosecutorial discretion and, as a consequence, his ability to act as responding counsel was not impaired.

La demande a été reprise le 18 décembre 1984. À cette date, les accusations d'outrage avaient été rejetées parce que non fondées et la présente action pour libelle avait été instituée. Casey Hill a continué à représenter le ministère public, mais a révélé au juge Osler toutes les circonstances pertinentes. Il a fait valoir que les procédures soulevaient l'interprétation et l'application de principes juridiques et non pas l'exercice d'un pouvoir discrétionnaire de poursuivre et qu'en conséquence, sa capacité d'agir à titre d'avocat en défense n'était pas compromise.

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Scientology, nevertheless, moved to disqualify Casey Hill on the ground that occasions might arise where he would have to exercise a discretion as to the production of a document and as to the significance to be attached to it. Scientology contended that this could reflect adversely upon it and, in due course result in a favourable consideration of Casey Hill's libel suit. Scientology was essentially suggesting that Casey Hill would use his position as Crown counsel to further his private interests. This was a serious attack on his professional integrity which added to the sting of the libel uttered to that point.

Scientologie a tout de même présenté une requête en vue de faire prononcer l'inhabilité de Casey Hill pour le motif qu'il pouvait se présenter des cas où il aurait à exercer son pouvoir discrétionnaire relativement à la production d'un document et à l'importance qu'il faudrait lui prêter. Scientologie a fait valoir que cela risquait de lui nuire et, à la longue, de faire bénéficier l'action pour libelle de Casey Hill d'une considération favorable. Scientologie donnait essentiellement à entendre que Casey Hill se servirait de ses fonctions d'avocat du ministère public pour promouvoir ses intérêts personnels. C'était là une grave attaque contre son intégrité personnelle qui ajoutait à l'offense du libelle commis jusque là.

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Osler J. emphatically rejected these arguments. He stated that it was fundamentally important for the Crown to "proceed courageously in the face of threats and attempts at intimidation or in the face of proceedings that have been found to be ground-

Le juge Osler a rejeté catégoriquement ces arguments. Il a déclaré qu'il était fondamentalement important pour le ministère public de [TRADUCTION] «poursuivre avec courage malgré les menaces et les tentatives d'intimidation ou malgré

less but have obviously had the effect of harassment”.

(F) *Pleas of Justification*

On February 18, 1985, Scientology delivered its statement of defence in this action. Notwithstanding the findings contained in the Felske Memorandum prepared by its own members, and the conclusion reached by Cromarty J. in the contempt hearing, Scientology entered a plea of justification.

Scientology also put forward as true an allegation that Casey Hill directed and supervised the OPP in the opening and reviewing of 20 boxes of documents which had been sealed by order of Linden J. This was found by the Court of Appeal to constitute a separate allegation of contempt and a further attack upon the integrity of Casey Hill in the performance of his duties as Crown counsel.

Scientology maintained its plea of justification throughout the trial and did not withdraw it until the first day of the hearing before the Court of Appeal on December 6, 1993, some nine years after the original libel.

Morris Manning delivered his statement of defence on April 1, 1985, and also asserted a plea of justification which he did not withdraw until the week prior to the commencement of the trial. He persisted in this plea despite the decision of Cromarty J. dismissing the motion to commit Casey Hill for contempt and despite the overwhelming evidence indicating that the allegations made against Hill were false.

(G) *The Conduct of Scientology at Trial*

Scientology continued its attack against Casey Hill throughout the trial of this action, both in the presence of the jury and in its absence. More than once, it reiterated the libel even though it knew that these allegations were false. Clearly, it sought to repeatedly attack Casey Hill's moral character. Some examples are set out below.

les procédures qui, bien que jugées sans fondement, avaient de toute évidence entraîné des vexations».

(F) *La défense de justification*

Le 18 février 1985, Scientology a communiqué sa défense en l'espèce. En dépit des conclusions du mémoire de Felske, rédigé par ses propres membres, et de la conclusion du juge Cromarty dans le cadre de l'action pour outrage, Scientology a invoqué la défense de justification.

Scientologie a également soutenu la véracité de l'allégation suivant laquelle Casey Hill avait dirigé et supervisé la PPO lors de l'ouverture et de l'examen de 20 boîtes de documents qui avaient été scellés sur ordonnance du juge Linden. La Cour d'appel a conclu qu'il s'agissait d'une allégation d'outrage distincte et d'une seconde attaque contre l'intégrité de Casey Hill dans l'exécution de ses fonctions de substitut du procureur général.

Scientologie a maintenu sa défense de justification tout au long du procès et ne l'a retirée que le premier jour de l'audience devant la Cour d'appel le 6 décembre 1993, quelque neuf ans après le libelle initial.

Morris Manning a déposé sa défense le 1^{er} avril 1985, invoquant lui aussi une défense de justification qu'il n'a retirée qu'une semaine avant l'ouverture du procès. Il a maintenu ce plaidoyer malgré le rejet par le juge Cromarty de la requête visant à envoyer Casey Hill à procès pour outrage et en dépit d'une preuve abondante de la fausseté des allégations visant Hill.

(G) *Le comportement de Scientology au procès*

Scientologie a maintenu ses attaques contre Casey Hill tout au long du procès dans la présente action, tant en présence du jury qu'en son absence. Plus d'une fois elle a réitéré le libelle tout en sachant que ces allégations étaient fausses. De toute évidence, elle a cherché à maintes reprises à attaquer la moralité de Casey Hill. Des exemples sont donnés plus loin.

(1) The Cross-Examination of Casey Hill

45 Counsel for Scientology subjected Casey Hill to a lengthy cross-examination which the Court of Appeal correctly described as a "skilful and deliberate attempt at character assassination" (p. 452 O.R.). Counsel suggested that Casey Hill often improperly coached his witnesses and took the same approach with respect to his own testimony at the libel trial. It was insinuated that Casey Hill was an untrustworthy person who would breach his undertakings as he had done in this case in relation to the sealed documents. Attempts were also made to blame him for the failure to give notice to Scientology concerning the application before Sirois J. even though he had been vindicated seven years earlier by Cromarty J.

(2) The "Veiled Threat" Against Clayton Ruby

46 Michael Code testified that during the course of his conversation with Casey Hill on September 6, 1984, the latter had made a veiled threat against Clayton Ruby which he described in the following terms:

He [Casey Hill] suggests we may receive an ominous reply to Clay's complaints. He is awaiting a report back from the police. What he said to me was something to the effect that there was a police investigation of Mr. Ruby's conduct and basically, you better watch it. [Emphasis added.]

47 When Casey Hill was called in reply, he denied making any such threat or using the word "ominous" during the conversation. Rather, he testified that he had used the word "omnibus" in reference to a combined reply to the letters that Ruby sent to the Solicitor General and to himself.

48 In cross-examination, counsel for Scientology accused Casey Hill of fabricating this version of events. Not only did counsel suggest that Hill had lied on the stand, but the general tenor of his questioning implied that Hill was so unprincipled that

(1) Le contre-interrogatoire de Casey Hill

Les avocats de Scientology ont soumis Casey Hill à un long contre-interrogatoire que la Cour d'appel a qualifié à juste titre de [TRADUCTION] «tentative habile et délibérée de porter atteinte à sa moralité» (p. 452 O.R.). L'avocat a laissé à entendre qu'il arrivait fréquemment à Casey Hill de préparer improprement ses témoins et qu'il avait fait la même chose pour son témoignage lors du procès pour libelle. Il a insinué que Casey Hill n'était pas digne de confiance et qu'il ne respectait pas ses engagements, comme l'indiquait ce qu'il avait fait dans la présente affaire relativement aux documents scellés. Il a tenté également de le blâmer pour son omission de donner avis à Scientology de la demande soumise au juge Sirois bien que, sept ans plus tôt, le juge Cromarty lui eut donné raison.

(2) La «menace voilée» proférée contre Clayton Ruby

Michael Code a témoigné qu'au cours de sa conversation avec Casey Hill le 6 septembre 1984, ce dernier avait proféré une menace voilée contre Clayton Ruby, qu'il décrit de la façon suivante:

[TRADUCTION] Il [Casey Hill] laisse entendre que nous recevrons peut-être une réponse alarmante [«*ominous*»] aux plaintes de Clay. Il attend un rapport de la police. Ce qu'il m'a dit en fait, c'est que la police menait une enquête sur les agissements de M. Ruby et qu'essentiellement, nous devrions nous tenir sur nos gardes. [Je souligne.]

Lorsque Casey Hill a été appelé en contre-preuve, il a nié avoir proféré ces menaces ou avoir utilisé le mot «alarmante» [«*ominous*»] au cours de la conversation. Il a témoigné avoir plutôt utilisé le mot «*omnibus*» en référence à une réponse combinée aux lettres que Ruby avait envoyées au solliciteur général et à lui-même.

En contre-interrogatoire, l'avocat de Scientology a accusé Casey Hill d'avoir fabriqué cette version des événements. Non seulement l'avocat a-t-il laissé entendre que Hill avait menti à la barre, mais le sens général de son interrogatoire impliquait que

he would use the power of the state to intimidate an opposing lawyer.

(3) The Closing Address to the Jury by Counsel for Scientology

During his closing address, counsel for Scientology contended that Casey Hill had demonstrated feigned and insincere emotion when he described his reaction to seeing the publication of the CFTO broadcast on the evening of September 17, 1984. He suggested to the jury that it may have been nothing more than a "skilled performance to tug at your heartstrings" in order to influence the verdict.

(H) *The Events Following the Verdict of the Jury*

The day after the jury's verdict, on October 4, 1991, Scientology republished the libel in a press release delivered to the media. A few weeks later, it issued another press release attacking the verdict of the jury as "outrageous" and "so exorbitant and so grossly out of proportion that it was influenced more by *L.A. Law* than Canadian legal tradition". Shortly thereafter, it proceeded with a motion before Carruthers J. to adduce evidence which, it contended, would bear "directly on the credibility and reputation of the plaintiff S. Casey Hill". That motion was later withdrawn.

II. Judgments Below

(A) *Trial by Jury* (Carruthers J. presiding)

This action for damages for libel was commenced on December 14, 1984. The trial before Carruthers J. and a jury lasted from September 3, 1991 until October 3, 1991. The questions posed to the jury and their answers were as follows:

SPECIAL VERDICT

QUESTIONS

A. With Respect to the Defendant, Morris Manning

Hill était dénué de principes au point d'utiliser le pouvoir de l'État pour intimider un avocat adverse.

(3) L'exposé final de l'avocat de Scientology au jury

Dans son exposé final, l'avocat de Scientology a soutenu que Casey Hill avait démontré une émotion feinte et dénuée de sincérité en décrivant sa réaction à la diffusion du reportage à CFTO dans la soirée du 17 septembre 1984. Il a indiqué au jury qu'il s'agissait ni plus ni moins d'une [TRADUCTION] «performance habile pour faire vibrer vos cordes sensibles» afin d'influencer le verdict.

(H) *Les événements postérieurs au verdict du jury*

Le lendemain du verdict du jury, soit le 4 octobre 1991, Scientology a publié de nouveau le libelle dans un communiqué de presse transmis aux médias. Quelques semaines plus tard, elle a publié un second communiqué de presse, qualifiant le verdict du jury d'[TRADUCTION] «outrageant» et de «si exorbitant et exagéré qu'il relève davantage de la série *L.A. Law* que de la tradition juridique canadienne». Peu après, elle a présenté une requête devant le juge Carruthers pour produire des éléments de preuve qui, selon elle, porteraient [TRADUCTION] «directement sur la crédibilité et la réputation du demandeur S. Casey Hill». Cette requête a été retirée par la suite.

II. Les décisions des juridictions inférieures

(A) *Le procès devant jury* (présidé par le juge Carruthers)

L'action en dommages-intérêts pour libelle a été intentée le 14 décembre 1984. Le procès tenu devant le juge Carruthers et un jury s'est déroulé du 3 septembre 1991 au 3 octobre 1991. Les questions posées au jury et leurs réponses ont été les suivantes:

[TRADUCTION]

VERDICT SPÉCIAL

QUESTIONS

A. Relativement au défendeur Morris Manning

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1. Did the CBC broadcast refer to the plaintiff?

A. Yes

2. Did Morris Manning instruct, authorize or consent to the publication of the Notice of Motion at the press conference?

A. Yes

B. With Respect to Both Defendants

3. Are the words complained of in the CFTO and CBC broadcasts on September 17, 1984, the Globe & Mail article on September 18, 1984 and the Notice of Motion defamatory of the plaintiff?

A. Yes

4. If the answer to Question 3 is "yes", what general damages, if any, is the plaintiff, Casey Hill, entitled to from the defendants, The Church of Scientology of Toronto and Morris Manning?

A. \$300,000

5. If your answer to Question 3 is "yes", is he entitled to any aggravated damages from the defendant, Morris Manning, in addition to any general damages already assessed, and if so, in what amount?

A. Nil

6. If your answer to Question 3 is "yes", is he entitled to any aggravated damages from the defendant, The Church of Scientology of Toronto, in addition to any general damages already assessed, and if so, in what amount?

A. \$500,000

7. If your answer to Question 3 is "yes", is he entitled to any punitive damages from the defendant, The Church of Scientology of Toronto, and if so, in what amount?

A. \$800,000

1. Le reportage de CBC mentionnait-il le demandeur?

R. Oui

2. Morris Manning a-t-il demandé ou autorisé la publication de l'avis de requête à la conférence de presse, ou y a-t-il consenti?

R. Oui

B. Relativement aux deux défendeurs

3. Les propos dont on se plaint dans les reportages de CFTO et de CBC du 17 septembre 1984, dans l'article du Globe & Mail du 18 septembre 1984, et l'avis de requête, sont-ils diffamatoires à l'égard du demandeur?

R. Oui

4. Si la réponse à la question 3 est affirmative, quels dommages-intérêts généraux, le cas échéant, le demandeur Casey Hill est-il fondé à recevoir des défendeurs, l'Église de scientologie de Toronto et Morris Manning?

R. 300 000 \$

5. Si la réponse à la question 3 est affirmative, est-il fondé à recevoir des dommages-intérêts majorés du défendeur Morris Manning outre les dommages-intérêts généraux déjà fixés et, dans l'affirmative, quel montant?

R. Aucun

6. Si la réponse à la question 3 est affirmative, est-il fondé à recevoir des dommages-intérêts majorés de la défenderesse l'Église de scientologie de Toronto outre les dommages-intérêts généraux déjà fixés et, dans l'affirmative, quel montant?

R. 500 000 \$

7. Si la réponse à la question 3 est affirmative, est-il fondé à recevoir des dommages-intérêts punitifs de la défenderesse l'Église de scientologie de Toronto et, dans l'affirmative, quel montant?

R. 800 000 \$

Following the verdict, the appellants made a motion before Carruthers J. requesting that he completely disregard the jury's assessment of damages because it was "outrageous, exorbitant and entirely out of proportion to the sting of the defamation" ((1992), 7 O.R. (3d) 489, at p. 497). Carruthers J. concluded that the jury was properly instructed as to the object and purpose of each head of damage and that there was evidence upon

Une fois le verdict rendu, les appelants ont déposé une requête devant le juge Carruthers, réclamant qu'il ne tienne aucun compte de l'évaluation par le jury des dommages-intérêts parce qu'elle était [TRADUCTION] «outrageante, exorbitante et sans proportion aucune avec le tort causé par la diffamation» ((1992), 7 O.R. (3d) 489, à la p. 497). Le juge Carruthers a conclu que le jury avait reçu des directives justes quant au but et à

which the jury could have reached a conclusion that it was entitled to award damages under each of the three heads.

Carruthers J. refused to “invade the province of the jury” in order to make his own assessment of the damages (at p. 502). He noted that since both defendants vigorously opposed each of the several motions on behalf of the plaintiff to discharge the jury, it was not open to them to suggest that he fix damages himself.

(B) *Court of Appeal* (1994), 18 O.R. (3d) 385

The Court of Appeal, in its careful and extensive reasons, rejected the appellants’ allegation that the common law of defamation violated s. 2(b) of the *Canadian Charter of Rights and Freedoms*. It did so for two reasons. First, the court held that it was nothing more than a “bare assertion” of unconstitutionality which could not support their constitutional challenge (at p. 414). Second, the court held that even if the constitutional challenge could be resolved in the absence of an evidentiary foundation, the appellants failed to show that the action for damages commenced by Casey Hill was a form of “government action” which was necessary in order to attract the application of the *Charter*. The court rejected the argument that Casey Hill’s position as a public figure implicated the government in whatever action he pursued. It also dismissed the submission that the government funding of his action was relevant to this question.

The Court of Appeal then considered the argument that interpreting the common law in a manner consistent with the *Charter* required the adoption of the “actual malice” standard of liability set out in the reasons of the U.S. Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). There, Brennan J. held that public officials could only collect damages for statements concerning their fitness for office in circumstances where they could demonstrate that the defamatory

l’objet de chaque catégorie de dommages-intérêts et qu’il existait une preuve sur le fondement de laquelle le jury pouvait estimer justifié d’accorder des dommages-intérêts relativement à chacune des trois catégories.

Le juge Carruthers a refusé d’[TRADUCTION] «empiéter sur la compétence du jury» et de fixer lui-même les dommages-intérêts (à la p. 502). Il a signalé que, comme les deux défendeurs s’étaient opposés vigoureusement à toutes les requêtes présentées pour le compte du demandeur en vue de libérer le jury, il ne leur appartenait pas de proposer qu’il fixe lui-même le montant des dommages-intérêts.

(B) *La Cour d’appel* (1994), 18 O.R. (3d) 385

Dans des motifs minutieux et approfondis, la Cour d’appel a écarté pour deux raisons la prétention des appelants selon laquelle la common law de la diffamation viole l’al. 2b) de la *Charte canadienne des droits et libertés*. La cour a statué d’une part qu’il ne s’agissait de rien de plus qu’une «simple affirmation» d’inconstitutionnalité qui ne pouvait étayer leur contestation constitutionnelle (à la p. 414). D’autre part, elle a conclu que, même si la contestation constitutionnelle pouvait être résolue sans preuve à l’appui, les appelants n’avaient pas réussi à établir que l’action en dommages-intérêts introduite par Casey Hill était une forme d’«action gouvernementale», condition préalable à l’application de la *Charte*. La cour a rejeté l’argument selon lequel Casey Hill implique le gouvernement dans tout acte qu’il accomplit, parce qu’il est une personnalité publique. Elle a également écarté la prétention que le financement de cette action par le gouvernement était pertinent quant à la question.

La Cour d’appel a ensuite considéré l’argument selon lequel, pour interpréter la common law d’une manière qui soit conforme à la *Charte*, il faut adopter la norme de responsabilité de la «malveillance véritable», énoncée par la Cour suprême des États-Unis dans *New York Times Co. c. Sullivan*, 376 U.S. 254 (1964). Dans cette affaire, le juge Brennan a conclu que les représentants officiels ne pouvaient obtenir de dommages-intérêts relativement à des propos tenus sur leur compétence pro-

statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not" (p. 280). After noting that the common law concept of malice involves an assessment of different factors, such as animosity, hostility, ill will and spite, the court concluded that the adoption of the rule in *New York Times v. Sullivan*, *supra*, would result in a major change to the common law that was neither necessary nor merited. It found that the existing rule was historically based on sound policy reasons which recognized the importance of the protection of the reputation of individuals who assume the responsibilities of public officials.

fessionnelle que s'ils établissaient que l'auteur des propos diffamatoires [TRADUCTION] «savait qu'ils étaient faux ou ne se souciait pas de savoir s'ils étaient vrais ou faux» (p. 280). Ayant noté que le concept de la malveillance en common law commande l'appréciation de différents facteurs, tels l'animosité, l'hostilité, le mauvais vouloir et la rancune, la cour a conclu que l'adoption de la règle de *New York Times c. Sullivan*, précité, entraînerait en common law un changement important qui n'était ni nécessaire ni justifié. Selon la cour, la règle actuelle repose historiquement sur de solides considérations de principe qui reconnaissent l'importance de protéger la réputation des personnes qui assument des fonctions de représentants officiels.

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The appellants also submitted that the trial judge erred in ruling that the circumstances of the press conference did not constitute an occasion of qualified privilege and in declining to charge the jury with respect to that defence. The Court of Appeal found that under the common law, qualified privilege attached only to the publication of documents read or referred to in open court. It was opposed to conferring a privilege on a press conference held for the purpose of disseminating to the public details of a pending legal proceeding at a time when no document in connection with that legal proceeding had yet been filed in any court office. In rejecting the argument that this Court's judgment in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, superseded the common law rule, the court stated that, while there is a right to publish details of judicial proceedings before they are heard in open court, "such publication does not enjoy the protection of qualified privilege if it is defamatory" (p. 427).

Les appelants ont également fait valoir que le juge du procès avait commis une erreur en statuant que les circonstances qui entouraient la conférence de presse n'appelaient pas l'immunité relative et en refusant de faire un exposé au jury sur ce moyen de défense. La Cour d'appel a conclu qu'en common law, l'immunité relative ne peut être invoquée que relativement à la publication de documents lus ou mentionnés lors d'une audience publique. Elle a refusé d'entourer de l'immunité une conférence de presse tenue dans le but de communiquer au public des renseignements relatifs à une procédure en cours à un moment où aucun document n'avait encore été déposé devant un tribunal. En rejetant l'argument portant que la décision de notre Cour dans *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, évinçait la règle de common law, la Cour d'appel a déclaré que, s'il existe un droit de publier les détails d'une procédure judiciaire avant qu'elle fasse l'objet d'une audience publique, [TRADUCTION] «cette publication ne jouit pas de l'immunité relative si elle est diffamatoire» (p. 427).

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On the subject of general damages, the Court of Appeal examined the libellous statement, the circumstances of its publication and its effect on Casey Hill. It found that "[t]he false statements can be seen as little short of allegations of a criminal breach of trust" (p. 437), "calculated to engender in the minds of those who learned of [them] that

Sur la question des dommages-intérêts généraux, la Cour d'appel a étudié la teneur des propos diffamatoires, les circonstances de leur publication et leurs répercussions sur Casey Hill. Elle a conclu que [TRADUCTION] «[L]es propos erronés se rapprochent d'allégations d'abus de confiance criminel» (p. 437), «formulées de façon à engendrer dans

they were very serious and entirely credible" (p. 438). Accordingly, they justified a very substantial award of general damages to compensate Casey Hill for the damage to his reputation and the injury to his feelings. This, it was held, should be the result even though he had received several promotions and appointments by the time of trial.

With respect to aggravated damages, the Court of Appeal examined the circumstances existing prior to, at the time of and following the publication of the libel. It concluded that the jury was entitled to find that its award for general damages was not large enough to provide adequate solatium to Casey Hill for the aggravation of his injury which was caused by Scientology's malicious libel and reprehensible conduct.

The court then turned its attention to the issue of punitive damages and concluded as follows at p. 459:

What the circumstances of this case demonstrated beyond peradventure to the jury was that Scientology was engaged in an unceasing and apparently unstoppable campaign to destroy Casey Hill and his reputation. It must have been apparent to the jury that a very substantial penalty was required because Scientology had not been deterred from its course of conduct by a previous judicial determination that its allegations were unfounded nor by its own knowledge that its principal allegation [that the sealed documents had been opened] was false.

The court also observed that it would not interfere with the award of punitive damages on the ground that Scientology persisted in its attack on Casey Hill's reputation even after the jury's verdict.

On the question of pre-judgment interest, the court concluded that since the appellants had accommodated counsel for Casey Hill in order to permit him to participate in a Royal Commission, it would be unfair to charge them with prejudgment interest for this period. Also, in considering whether Morris Manning should bear an equal portion of the costs of the trial with Scientology, the

l'esprit de ceux qui les entendent l'impression qu'elles sont très graves et très crédibles» (p. 438). Ils justifiaient donc des dommages-intérêts généraux très élevés afin d'indemniser Casey Hill du tort causé à sa réputation et de la blessure infligée à son amour-propre. Et ceci, la cour a-t-elle conclu, en dépit du fait qu'il ait reçu différentes promotions et nominations avant que le procès commence.

Quant aux dommages-intérêts majorés, la Cour d'appel a examiné les circonstances avant, pendant et après la publication du libelle. Selon elle, le jury était justifié de conclure que les dommages-intérêts généraux ne constituaient pas une réparation morale suffisante quant à l'aggravation du tort causé à Casey Hill par le libelle malveillant de Scientology et sa conduite répréhensible.

La cour a ensuite tranché la question des dommages-intérêts punitifs, à la p. 459:

[TRADUCTION] Les circonstances ont révélé clairement au jury que Scientology avait lancé une campagne incessante et apparemment irrépressible pour détruire Casey Hill et sa réputation. Il a dû être apparent au jury qu'une pénalité sévère s'imposait puisque, Scientology n'a pas mis un terme à sa conduite alors que ses allégations avaient été jugées non fondées par une décision judiciaire antérieure et qu'elle savait que sa principale allégation [que les documents scellés avaient été ouverts] était fausse.

La cour a également mentionné qu'elle ne modifierait pas le montant des dommages-intérêts punitifs puisque Scientology avait persisté à attaquer la réputation de Casey Hill même après le verdict du jury.

Quant à la question de l'intérêt avant jugement, la cour a conclu que, puisque les appelants avaient permis que l'avocat de Casey Hill puisse participer à une Commission royale, il serait injuste de leur réclamer l'intérêt avant jugement couru pendant la période en cause. De même, pour ce qui est de savoir si Morris Manning devait assumer avec Scientology une part égale des frais du procès, la

court pointed out that much of the trial was devoted to the plea of justification pursued by Scientology alone. Furthermore, the majority of the damages were awarded against Scientology. Therefore, the court concluded that the trial costs should be apportioned, with Morris Manning paying only 30 percent of the assessed costs and Scientology the balance. However, it added that the parties should remain jointly and severally liable for all costs with each having a claim over against the other for any amount paid beyond their apportioned liability.

III. Analysis

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Two major issues are raised in this appeal. The first concerns the constitutionality of the common law action for defamation. The second relates to the damages that can properly be assessed in such actions.

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Let us first review the appellants' submissions pertaining to defamation actions. The appellants contend that the common law of defamation has failed to keep step with the evolution of Canadian society. They argue that the guiding principles upon which defamation is based place too much emphasis on the need to protect the reputation of plaintiffs at the expense of the freedom of expression of defendants. This, they say, is an unwarranted restriction which is imposed in a manner that cannot be justified in a free and democratic society. The appellants add that if the element of government action in the present case is insufficient to attract *Charter* scrutiny under s. 32, the principles of the common law ought, nevertheless, to be interpreted, even in a purely private action, in a manner consistent with the *Charter*. This, the appellants say, can only be achieved by the adoption of the "actual malice" standard of liability articulated by the Supreme Court of the United States in the case of *New York Times v. Sullivan*, *supra*.

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In addition, the appellant Morris Manning submits that the common law should be interpreted so as to afford the defence of qualified privilege to a lawyer who, acting on behalf of a client, reads and

cour a souligné que la plus grande partie du procès avait été consacrée à la défense de justification avancée par Scientology seule. En outre, la plus grande partie des dommages-intérêts a été adjugée contre Scientology. Par conséquent, la cour a conclu au partage des frais du procès, Morris Manning n'étant tenu de payer que 30 pour 100 des frais fixés et Scientology, le reste. Elle a toutefois ajouté que les parties demeureraient solidairement responsables de la totalité des frais, chacune jouissant d'une réclamation contre l'autre pour tout montant versé au-delà de sa propre responsabilité.

III. Analyse

Le pourvoi soulève deux questions centrales. La première est la constitutionnalité de l'action en diffamation en common law et la seconde, l'adjudication de dommages-intérêts dans ce type d'action.

Examinons d'abord les prétentions des appelants quant à l'action en diffamation. Ils font valoir que la common law en matière de diffamation n'a pas réussi à suivre l'évolution de la société canadienne. Ils soutiennent que les principes directeurs sur lesquels la diffamation est fondée attachent une trop grande importance à la nécessité de protéger la réputation des demandeurs au dépens de la liberté d'expression des défendeurs. Il s'agit là, selon eux, d'une restriction immotivée, imposée d'une manière injustifiée dans une société libre et démocratique. Les appelants ajoutent que, si l'élément de l'action gouvernementale dans la présente affaire est insuffisant pour déclencher l'application de l'analyse fondée sur la *Charte* sous le régime de l'art. 32, les principes de common law doivent néanmoins être interprétés, même dans une action purement privée, d'une manière conforme à la *Charte*. Et cela ne peut être accompli, selon les appelants, que si l'on adopte la norme de responsabilité de la «malveillance véritable», énoncée par la Cour suprême des États-Unis dans *New York Times c. Sullivan*, précité.

L'appellant Morris Manning soutient en outre qu'il y a lieu d'interpréter la common law de façon à ce que jouisse de la défense d'immunité relative tout avocat qui, agissant pour le compte de son

comments in public upon a notice of motion which he believes, in good faith, has been filed in court, and which subsequently is filed. Let us consider first whether the *Charter* is directly applicable to this case.

(A) *Application of the Charter*

The appellants have not challenged the constitutionality of any of the provisions of the *Libel and Slander Act*, R.S.O. 1990, c. L.12. The question, then, is whether the common law of defamation can be subject to *Charter* scrutiny. The appellants submit that by reason of his position as a government employee, Casey Hill's action for damages constitutes "government action" within the meaning of s. 32 of the *Charter*. In the alternative, the appellants submit that, pursuant to s. 52 of the *Constitution Act, 1982*, the common law must be interpreted in light of *Charter* values. I will address the s. 32 argument first.

(1) Section 32: Government Action

Section 32(1) reads:

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

In *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, McIntyre J., with regard to the application of the *Charter* to the common law, stated at pp. 598-99:

It is my view that s. 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government. It will apply to those branches of government whether or not their action is invoked in public or private litigation. . . . It will apply to the common law, however, only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom. [Emphasis added.]

client, lit et commente en public un avis de requête qu'il croit, de bonne foi, être déposé devant le tribunal, et qui est déposé par la suite. Voyons d'abord si la *Charte* s'applique directement en l'espèce.

(A) *L'application de la Charte*

Les appelants n'attaquent pas la constitutionnalité d'une disposition de la *Loi sur la diffamation*, L.R.O. 1990, ch. L.12. La question, donc, est de savoir si la common law de la diffamation peut faire l'objet d'un examen sous le régime de la *Charte*. Les appelants font valoir que, puisque Casey Hill est un employé du gouvernement, son action en dommages-intérêts est une «action gouvernementale» au sens de l'art. 32 de la *Charte*. Subsidiairement, les appelants soutiennent que, conformément à l'art. 52 de la *Loi constitutionnelle de 1982*, la common law doit être interprétée en fonction des valeurs véhiculées par la *Charte*. J'examinerai d'abord l'argument relatif à l'art. 32.

(1) Article 32: l'action gouvernementale

Le paragraphe 32(1) dit:

32. (1) La présente charte s'applique:

a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;

b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

Dans *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573, aux pp. 598 et 599, le juge McIntyre dit ceci de l'application de la *Charte* à la common law:

J'estime donc que l'art. 32 de la *Charte* mentionne de façon précise les acteurs auxquels s'applique la *Charte*. Il s'agit des branches législative, exécutive et administrative. Elle leur est applicable peu importe que leurs actes soient en cause dans des litiges publics ou privés. [. . .] Cependant, elle ne s'applique à la common law que dans la mesure où la common law constitue le fondement d'une action gouvernementale qui, allègue-t-on, porte atteinte à une liberté ou à un droit garantis. [Je souligne.]

68 La Forest J., writing for the majority in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, stressed the importance of this limitation on the application of the *Charter* to the actions of government. He said this at p. 262:

The exclusion of private activity from the *Charter* was not a result of happenstance. It was a deliberate choice which must be respected. We do not really know why this approach was taken, but several reasons suggest themselves. Historically, bills of rights, of which that of the United States is the great constitutional exemplar, have been directed at government. Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual.

69 La Forest J. warned that subjecting all private and public action to constitutional review would mean reopening whole areas of settled law and would be "tantamount to setting up an alternative tort system" (p. 263). He expressed the very sage warning that this "could strangle the operation of society" (p. 262). See also McLellan and Elman, "To Whom Does the Charter Apply? Some Recent Cases on Section 32" (1986), 24 *Alta. L. Rev.* 361, at p. 367, cited in *Dolphin Delivery Ltd.*, *supra*, at p. 597.

70 The appellants argue that at all material times Casey Hill was an agent of the Crown, acting on behalf of the Attorney General of Ontario, and that the defamatory statements which are the subject of the present action were made in relation to acts undertaken by him in that capacity. They further submit that Casey Hill commenced these legal proceedings at the direction and with the financial support of the Attorney General in order to vindicate the damage to the reputation of the Ministry resulting from criticism levelled at the conduct of one of its officials. It is, therefore, contended that this action represents an effort by a government department to use the action of defamation to restrict and infringe the freedom of expression of the appellants in a manner that is contrary to the *Charter*.

Au nom de la majorité, le juge La Forest a souligné, dans *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229, l'importance de restreindre ainsi l'application de la *Charte* aux actions gouvernementales, disant ceci à la p. 262:

L'exclusion des activités privées de l'application de la *Charte* n'est pas le fruit du hasard. C'est un choix délibéré qu'il faut respecter. Nous ne savons pas vraiment pourquoi ce point de vue a été retenu, mais plusieurs raisons semblent s'imposer. Historiquement, les déclarations des droits, dont celle des États-Unis constitue l'exemple constitutionnel par excellence, visaient le gouvernement. C'est le gouvernement qui peut adopter et appliquer des règles et qui peut porter atteinte péremptoirement à la liberté individuelle. Seul le gouvernement a besoin de se voir imposer des contraintes dans la Constitution afin de préserver les droits des particuliers.

Le juge La Forest a souligné que soumettre toute action privée et publique à un examen constitutionnel entraînerait la reconsidération de domaines entiers où le droit est bien établi, et «reviendrait à instituer un régime subsidiaire de responsabilité civile» (p. 263). Fort judicieusement, il a prévenu que cela «pourrait paralyser le fonctionnement de la société» (p. 262). Voir également McLellan et Elman, «To Whom Does the Charter Apply? Some Recent Cases on Section 32» (1986), 24 *Alta. L. Rev.* 361, à la p. 367, cité dans *Dolphin Delivery Ltd.*, précité, à la p. 597.

Les appelants font valoir qu'à toutes les époques concernées, Casey Hill était un mandataire du ministère public agissant pour le compte du procureur général de l'Ontario, et que les propos diffamatoires en question ont été tenus relativement à des actes qu'il a accomplis en cette qualité. Ils soutiennent en outre que Casey Hill a introduit cette procédure judiciaire à la demande et avec l'appui financier du procureur général pour réparer le tort qu'ont causé à la réputation du ministère les critiques dirigées contre le comportement de l'un de ses représentants. Ils soutiennent donc que le gouvernement tente, par l'entremise de l'action en diffamation, de restreindre et de violer la liberté d'expression des appelants d'une manière qui est contraire à la *Charte*.

These submissions cannot be accepted. They have no legal, evidentiary or logical basis of support. Casey Hill's constitutional status for the purpose of the application of the *Charter* should not be determined by the nature of the allegations made against him. Rather, the determination of whether state involvement existed is dependent upon the circumstances surrounding the institution of the libel proceedings.

The fact that persons are employed by the government does not mean that their reputation is automatically divided into two parts, one related to their personal life and the other to their employment status. To accept the appellants' position would mean that identical defamatory comments would be subject to two different laws, one applicable to government employees, the other to the rest of society. Government employment cannot be a basis for such a distinction. Reputation is an integral and fundamentally important aspect of every individual. It exists for everyone quite apart from employment.

In order to establish the requisite government action for *Charter* scrutiny, the appellants argue that it is easy to distinguish between a janitor working in a government building who is simply an employee and a Crown Attorney who is an agent of the state. It is said that when a person who is clearly an agent of the state acts, he or she is acting for or on behalf of the state. I cannot accept this proposition. There are a significant number of public servants who represent the Crown in any number of ways. While it might be easy to differentiate between the extreme examples set forth by the appellants, the grey area between those extremes is too extensive and the functions of the officials too varied to draw any effective line of distinction. The experience in the United States following the decision in *New York Times v. Sullivan*, *supra*, is instructive in this regard. That case modified the common law in relation to defamation suits brought by public officials and touched off an intense debate with respect to who might be designated as a public official or figure rather than a private person. See, for example, G. C. Christie, "Injury to Reputation and the Constitution: Confu-

Ces prétentions ne sauraient être retenues. Elles sont dénuées de tout fondement, que ce soit en droit, dans la preuve ou sur le plan de la logique. Le statut constitutionnel de Casey Hill aux fins de l'application de la *Charte* ne saurait être déterminé selon la nature des allégations le visant. La réponse à la question de savoir s'il y a eu participation du gouvernement est plutôt tributaire des circonstances entourant le dépôt de l'action en libelle.

Le fait pour une personne de travailler pour le gouvernement ne signifie pas que sa réputation se divise automatiquement en deux moitiés, l'une reliée à sa vie privée et l'autre à son emploi. Faire droit à la prétention des appelants signifierait que des propos diffamatoires identiques seraient assujettis à deux régimes de droit différents, l'un s'appliquant aux employés du gouvernement et l'autre au reste de la population. L'emploi au sein du gouvernement ne peut fonder une telle distinction. La réputation est un aspect intégral et fondamentalement important de tout individu. Elle vaut pour tous, peu importe l'emploi occupé.

À l'appui de leur prétention qu'il y a action gouvernementale justifiant un examen fondé sur la *Charte*, les appelants soutiennent qu'on peut aisément établir une distinction entre le concierge qui travaille dans un immeuble du gouvernement, et qui est un simple employé, et le substitut du procureur général qui est mandataire de l'État. Les appelants soutiennent que, lorsqu'une personne qui est clairement un mandataire de l'État agit, elle agit pour le compte de l'État. Je ne puis accepter cette proposition. Nombre de fonctionnaires représentent l'État de différentes façons. S'il peut être facile de cerner la différence entre les deux situations énoncées par les appelants, la zone grise qui sépare ces deux extrêmes est trop importante et les fonctions des représentants trop variées pour établir une ligne de démarcation adéquate. Les événements qui, aux États-Unis, ont suivi l'arrêt *New York Times c. Sullivan*, précité, sont intéressants à cet égard. Cette affaire a modifié la common law en matière d'actions en diffamation intentées par les représentants officiels, et a lancé au sein des tribunaux et dans la doctrine un vif débat quant à savoir qui peut être considéré comme personnalité

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sion Amid Conflicting Approaches" (1976), 75 *Mich. L. Rev.* 43.

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There is no doubt that Crown Attorneys exercise statutory powers as agents of the government. See *Ministry of the Attorney General Act*, R.S.O. 1990, c. M.17; *Crown Attorneys Act*, R.S.O. 1990, c. C.49; and the *Criminal Code*, s. 504. Therefore, as McIntyre J. pointed out in *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 209, they benefit from the protection of any immunity which attaches to their office. However, they may become personally liable when they exceed their statutory powers. By extension, actions taken by Crown Attorneys which are outside the scope of their statutory duties are independent of and distinct from their status as agents for the government. Such was the case here.

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The appellants impugned the character, competence and integrity of Casey Hill, himself, and not that of the government. He, in turn, responded by instituting legal proceedings in his own capacity. There was no evidence that the Ministry of the Attorney General or the Government of Ontario required or even requested him to do so. Neither is there any indication that the Ministry controlled the conduct of the litigation in any way. See *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, at pp. 311-14. Further, the fact that Casey Hill's suit may have been funded by the Ministry of the Attorney General does not alter his constitutional status or cloak his personal action in the mantle of government action. See *McKinney*, *supra*, at p. 269.

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The private nature of these proceedings is apparent, as well, from the respondent's statement of claim, and particularly from the allegation contained in para. 19 that the defamatory statements:

... constituting as they do statements of the most serious professional misconduct by the Plaintiff, have dam-

ou représentant public ou personne privée. Voir par exemple G. C. Christie, «Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches» (1976), 75 *Mich. L. Rev.* 43.

Il est certain qu'à titre de mandataires du gouvernement, les substituts du procureur général exercent des pouvoirs qui leur sont conférés par la loi. Voir la *Loi sur le ministère du Procureur général*, L.R.O. 1990, ch. M.17; la *Loi sur les procureurs de la Couronne*, L.R.O. 1990, ch. C.49; et le *Code criminel*, art. 504. Par ailleurs, comme le juge McIntyre l'a souligné dans *Nelles c. Ontario*, [1989] 2 R.C.S. 170, à la p. 209, ils jouissent de la protection de toute immunité dont est assortie leur charge. Ils peuvent cependant devenir personnellement responsables s'ils outrepassent les pouvoirs que leur confère la loi. Par extension, les actes des substituts du procureur général qui excèdent le cadre de leurs fonctions d'origine législative sont indépendants et distincts de leur qualité de mandataires du gouvernement. Tel était le cas en l'espèce.

Les appelants ont attaqué la moralité, la compétence et l'intégrité de Casey Hill, et non ceux du gouvernement. À son tour, il a répliqué en instituant une procédure judiciaire de son propre chef. Aucune preuve n'indique que le ministère du Procureur général ou le gouvernement de l'Ontario ont exigé ou même demandé qu'il le fasse, ni que le ministère veillait de quelque façon au déroulement du litige. Voir *Lavigne c. Syndicat des employés de la fonction publique de l'Ontario*, [1991] 2 R.C.S. 211, aux pp. 311 à 314. Par ailleurs, le fait que l'action intentée par Casey Hill puisse avoir été financée par le ministère du Procureur général ne change rien à son statut constitutionnel, ni ne revêt son action personnelle du statut d'action gouvernementale. Voir *McKinney*, précité, à la p. 269.

On peut également reconnaître la nature privée de la procédure dans la déclaration de l'intimé, particulièrement dans l'allégation contenue au par. 19, portant que les propos diffamatoires:

[TRADUCTION] ... accusant le demandeur de la plus grave inconduite professionnelle, ont causé un tort à sa

aged his professional reputation and brought him into public scandal, odium and contempt, by reason of which the Plaintiff has suffered damage.

The position taken by the appellants at trial is also revealing. Scientology argued that Casey Hill was proceeding with the litigation to advance his "secondary private interest", that he was trying to "get back at [Scientology] for prosecuting him for contempt", and that the libel action amounted to "a risk-free opportunity . . . to pick up some easy money".

The personal nature of the libel action is also evident in the cross-examination of Casey Hill concerning his work with the OPP. At that time, counsel for Scientology stated that the libel action had nothing "to do with damages suffered by Mr. Hill. It's part of an attack motivated by the attitude towards the Church of Scientology, motivated by the fact that as a result of the contempt prosecution he is removed from prosecuting".

In my opinion, the appellants have not satisfied the government action requirement described in s. 32. Therefore, the *Charter* cannot be applied directly to scrutinize the common law of defamation in the circumstances of this case.

Even if there were sufficient government action to bring this case within s. 32, the appellants failed to provide any evidentiary basis upon which to adjudicate their constitutional attack. This Court has stated on a number of occasions that it will not determine alleged *Charter* violations in the absence of a proper evidentiary record. See, for example, *MacKay v. Manitoba*, [1989] 2 S.C.R. 357. In light of the conclusion that the government action requirement of s. 32 has not been met, I need not address this issue. Yet, I feel a brief comment is necessary because of the light it sheds on the manner in which the appellants have conducted themselves in this litigation.

The action was commenced in December 1984. By the fall of 1985, the appellants were made

réputation professionnelle et ont entraîné un scandale, une humiliation et un outrage publics qui lui ont causé un préjudice.

L'argumentation des appelants au procès est également révélatrice. Scientology a fait valoir que Casey Hill avait engagé la procédure dans le but de promouvoir [TRADUCTION] «ses intérêts privés secondaires», qu'il tentait de «se venger de [Scientologie] parce qu'elle l'avait poursuivi pour outrage», et que l'action pour libelle équivalait à une «chance assurée [. . .] de se faire de l'argent facilement».

La nature personnelle de l'action en libelle ressort également du contre-interrogatoire de Casey Hill sur son travail avec la PPO. À cette époque, l'avocat de Scientology a déclaré que l'action en libelle n'avait rien [TRADUCTION] «à voir avec le tort subi par M. Hill. Elle s'inscrit dans le cadre d'une attaque motivée par l'attitude adoptée envers l'Église de scientologie, et par le fait que l'action pour outrage a eu pour effet de l'empêcher d'agir dans une poursuite».

À mon avis, les appelants n'ont pas établi l'existence de l'action gouvernementale définie à l'art. 32. On ne peut donc recourir directement à la *Charte* en l'espèce pour examiner la common law de la diffamation.

Même s'il y avait eu action gouvernementale suffisante pour entraîner l'application de l'art. 32, les appelants n'ont pas fourni un fondement de preuve qui permettrait de résoudre leur contestation constitutionnelle. En effet, notre Cour a déclaré à de nombreuses reprises qu'elle ne se prononcerait pas sur des allégations de violation de la *Charte* en l'absence d'une preuve suffisante. Voir par exemple *MacKay c. Manitoba*, [1989] 2 R.C.S. 357. Étant donné qu'il n'a pas été satisfait à l'exigence relative à l'action gouvernementale définie à l'art. 32, je ne traiterai pas de cette question. J'estime tout de même qu'il est nécessaire d'ajouter un bref commentaire en raison de la lumière qu'il jette sur le comportement des appelants dans le litige.

L'action a été intentée en décembre 1984. À l'automne 1985, les appelants avaient été avisés de

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aware of the requirement to adduce constitutional evidence. In dismissing the appellants' pre-trial motion with respect to the constitutional issues, O'Driscoll J. clearly indicated that the constitutional questions must be decided upon evidence adduced at trial. The date for trial was fixed in January 1991 and confirmed in June. On September 4, 1991, two days into the proceedings, counsel for Scientology sought to adjourn the trial on the grounds that there was "a possibility of . . . seeking to call expert evidence in regard to the freedom of speech issue in this trial". Counsel conceded that he had not prepared or delivered any reports of experts in respect to this issue, and indeed, that he had not yet even consulted with experts. He simply wanted the adjournment in order to "explore that area". The request for adjournment was very properly dismissed.

leur obligation de produire une preuve à caractère constitutionnel. En rejetant la requête préalable au procès des appelants relativement aux questions constitutionnelles, le juge O'Driscoll a clairement indiqué que les questions constitutionnelles devaient être tranchées sur le fondement de la preuve produite au procès. La date du procès a été fixée en janvier 1991, puis confirmée en juin. Le 4 septembre 1991, deux jours après l'ouverture du procès, l'avocat de Scientology en a demandé l'ajournement pour le motif qu'il [TRADUCTION] «envisage[ait] d'appeler un expert à témoigner relativement à la question de la liberté d'expression dans le cadre du procès». L'avocat a admis ne pas avoir rédigé ou remis de rapports d'experts sur cette question ni, en fait, avoir même consulté des experts. Il souhaitait simplement un ajournement afin d'«étudier cette question». Sa demande, à très juste titre, a été rejetée.

82 There is no government action involved in this defamation suit. It now must be determined whether a change or modification in the law of defamation is required to make it comply with the underlying values upon which the *Charter* is founded.

Il n'y a aucune action gouvernementale dans cette action en diffamation. Il faut maintenant déterminer s'il y a lieu de changer ou de modifier le droit de la diffamation pour le rendre conforme aux valeurs qui sous-tendent la *Charte*.

(2) Section 52: Charter Values and the Common Law

(2) Article 52: les valeurs de la Charte et la common law

(a) *Interpreting the Common Law in Light of the Values Underlying the Charter*

a) *L'interprétation de la common law à la lumière des valeurs de la Charte*

(i) Review of the Decisions Dealing With the Issue

(i) L'examen des décisions portant sur la question

83 This Court first considered the application of the *Charter* to the common law in *Dolphin Delivery*, *supra*. In that case, the issue was whether an injunction to restrain secondary picketing violated the *Charter* freedom of expression. It was held that, pursuant to s. 32(1) of the *Charter*, a cause of action could only be based upon the *Charter* when particular government action was impugned. Therefore, the constitutionality of the common law could be scrutinized in those situations where a case involved government action which was authorized or justified on the basis of a common law rule which allegedly infringed a *Charter* right.

Notre Cour a examiné pour la première fois l'application de la *Charte* à la common law dans l'arrêt *Dolphin Delivery*, précité. Dans cette affaire, la question était de savoir si une injonction interdisant le piquetage secondaire violait la liberté d'expression garantie par la *Charte*. Notre Cour a conclu que, conformément au par. 32(1) de la *Charte*, la cause d'action ne pouvait être fondée sur la *Charte* que lorsqu'une action gouvernementale donnée était attaquée. Il était par conséquent possible d'examiner la constitutionnalité de la common law lorsqu'était en cause une action gouvernementale autorisée ou justifiée par une règle

However, *Dolphin Delivery*, *supra*, also held that the common law could be subjected to *Charter* scrutiny in the absence of government action. McIntyre J. wrote, at pp. 592-93, that, in light of s. 52(1) of the *Constitution Act, 1982*, "there can be no doubt" that the *Charter*, applies to the common law:

The English text provides that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". If this language is not broad enough to include the common law, it should be observed as well that the French text adds strong support to this conclusion in its employment of the words "*elle rend inopérantes les dispositions incompatibles de tout autre règle de droit*". . . . To adopt a construction of s. 52(1) which would exclude from *Charter* application the whole body of the common law which in great part governs the rights and obligations of the individuals in society, would be wholly unrealistic and contrary to the clear language employed in s. 52(1) of the Act. [Emphasis in *Dolphin Delivery*.]

In emphasizing that the common law should develop in a manner consistent with *Charter*-principles, a distinction was drawn between private litigants founding a cause of action on the *Charter* and judges exercising their inherent jurisdiction to develop the common law. At page 603 this was written:

Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the *Charter* will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the *Charter* is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the purported assertion of *Charter* causes of action or *Charter* defences between individuals. [Emphasis added.]

de common law dont on alléguait qu'elle portait atteinte à un droit garanti par la *Charte*. Toutefois, cet arrêt conclut aussi que la common law peut être soumise à un examen fondé sur la *Charte* même en l'absence d'action gouvernementale. Le juge McIntyre dit aux pp. 592 et 593 que, compte tenu du par. 52(1) de la *Loi constitutionnelle de 1982*, «il n'y a pas de doute» que la *Charte* s'applique à la common law:

Le texte anglais de la disposition se lit ainsi: «*any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect*». À supposer que ces termes ne soient pas assez généraux pour inclure la *common law*, on devrait faire observer également que le texte français vient appuyer davantage cette conclusion en ce qu'il utilise les mots «*elle rend inopérantes les dispositions de toute autre règle de droit*». [...] Adopter une interprétation du par. 52(1) qui soustrairait à l'application de la *Charte* l'ensemble de la *common law* qui régit dans une large mesure les droits et les obligations des individus dans la société, serait totalement irréaliste et contraire aux termes clairs utilisés dans ce paragraphe. [Souligné dans *Dolphin Delivery*.]

Tout en soulignant que la common law devrait évoluer de manière compatible avec les principes de la *Charte*, il a établi une distinction entre les particuliers qui fondent une cause d'action sur la *Charte* et les juges qui exercent leur compétence inhérente en vue de l'élaboration de la common law. À la p. 603, il a écrit:

Toutefois, lorsque «A», une partie privée, actionne «B», une partie privée, en s'appuyant sur la *common law* et qu'aucun acte du gouvernement n'est invoqué à l'appui de la poursuite, la *Charte* ne s'appliquera pas. Je dois toutefois dire clairement que c'est une question différente de celle de savoir si le judiciaire devrait expliquer et développer des principes de *common law* d'une façon compatible avec les valeurs fondamentales enchâssées dans la Constitution. La réponse à cette question doit être affirmative. En ce sens, donc, la *Charte* est loin d'être sans portée pour les parties privées dont les litiges relèvent de la *common law*. Mais ceci est différent de la proposition qu'une partie privée a envers une autre une obligation constitutionnelle, proposition qui sous-tend la prétendue affirmation de causes d'action en vertu de la *Charte* ou de défenses entre particuliers en vertu de la *Charte*. [Je souligne.]

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Since 1986, this Court has subjected the common law to *Charter* scrutiny in a number of situations where government action was based upon a common law rule: *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *R. v. Swain*, [1991] 1 S.C.R. 933; *R. v. Salituro*, [1991] 3 S.C.R. 654; and *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835. However, *Dolphin Delivery*, *supra*, remains the only case which has closely examined the application of the *Charter* in the context of purely private litigation. Nevertheless, it is helpful to review the different approaches which have been suggested in those cases in order to better appreciate which principles should properly apply in cases of private litigation.

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In *R. v. Salituro*, *supra*, the Crown called the accused's estranged wife as a witness. The common law rule prohibiting spouses from testifying against each other was found to be inconsistent with developing social values and with the values enshrined in the *Charter*. At page 670, Iacobucci J., writing for the Court, held:

Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J. indicated in *Watkins*, *supra*, in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

Further, at p. 675 this Court held:

Where the principles underlying a common law rule are out of step with the values enshrined in the *Charter*, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with *Charter* values, without upsetting the proper balance between judicial and legislative action that I have referred to above, then the rule ought to be changed.

Depuis 1986, notre Cour a soumis la common law à un examen fondé sur la *Charte* dans plusieurs cas où l'action gouvernementale reposait sur une règle de common law: *B.C.G.E.U. c. Colombie-Britannique (Procureur général)*, [1988] 2 R.C.S. 214; *R. c. Swain*, [1991] 1 R.C.S. 933; *R. c. Salituro*, [1991] 3 R.C.S. 654; et *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Toutefois, *Dolphin Delivery*, précité, demeure le seul arrêt où a été soigneusement analysée l'application de la *Charte* dans le contexte d'un litige purement privé. Il est néanmoins utile de revoir les différentes positions qui ont été avancées dans ces affaires afin de mieux déterminer les principes applicables dans le contexte de litiges privés.

Dans *R. c. Salituro*, précité, le ministère public a appelé à témoigner l'épouse de l'accusé, dont il vivait séparé. La règle de common law qui rend les conjoints inhabiles à témoigner a été jugée incompatible avec l'évolution des valeurs sociales et avec les valeurs consacrées dans la *Charte*. Le juge Iacobucci, pour la Cour, a conclu à la p. 670:

Les juges peuvent et doivent adapter la common law aux changements qui se produisent dans le tissu social, moral et économique du pays. Ils ne doivent pas s'empêcher de perpétuer des règles dont le fondement social a depuis longtemps disparu. D'importantes contraintes pèsent cependant sur le pouvoir des tribunaux de changer le droit. Comme le juge McLachlin l'a souligné dans l'arrêt *Watkins*, précité, en régime de démocratie constitutionnelle comme le nôtre, c'est le législateur et non les tribunaux qui assume, quant à la réforme du droit, la responsabilité principale; et tout changement qui risquerait d'entraîner des conséquences complexes devrait, aussi nécessaire ou souhaitable soit-il, être laissé au législateur. Le pouvoir judiciaire doit limiter son intervention aux changements progressifs nécessaires pour que la common law suive l'évolution et le dynamisme de la société.

Notre Cour a en outre conclu ceci à la p. 675:

Lorsque les principes sous-tendant une règle de common law ne sont pas conformes aux valeurs consacrées dans la *Charte*, les tribunaux devraient examiner soigneusement cette règle. S'il est possible de la modifier de manière à la rendre compatible avec les valeurs de la *Charte*, sans perturber le juste équilibre entre l'action judiciaire et l'action législative dont il a été question précédemment, elle doit être modifiée.

Unlike the present appeal and the decisions of this Court in *B.C.G.E.U.*, *Swain*, and *Dagenais*, the common law rule in *Salituro* was not alleged to infringe a specific *Charter* right. Rather, it was alleged to be inconsistent with those fundamental values that provide the foundation for the *Charter*. Although the Court in *Salituro* considered whether Parliament had, through the *Evidence Act*, intended to preserve the common law rule, it did not undertake an analysis similar to that which would be required under s. 1 to determine if the *Charter* breach was justifiable. Rather, it proceeded to balance, in a broad and flexible manner, the conflicting values. The reasons examined the origins of the impugned common law rule and the justifications which had been raised for upholding it. These concerns were weighed against the *Charter*'s recognition of the equality of women and, more specifically, against the concept of human dignity which inspires the *Charter*. It was held that the values which were set out in the common law rule did not represent the values of today's society which are reflected in the provisions of the *Charter*.

In *B.C.G.E.U.*, *supra*, McEachern C.J.B.C. on his own motion issued an injunction against a union picketing in front of the courthouse: [1983] 6 W.W.R. 640. It was held that the common law rule giving rise to the picketing injunction breached s. 2(b). The breach was then found to be justified following a traditional s. 1 analysis.

Subsequently, in *R. v. Swain*, *supra*, Lamer C.J. observed that the s. 1 analysis, which has evolved since *R. v. Oakes*, [1986] 1 S.C.R. 103, may not always provide the appropriate framework by which to evaluate the justifications for maintaining a common law rule. In *R. v. Swain*, the Crown raised the insanity defence, over objections by the accused, on the basis of the common law rule which authorized such a procedure. That rule was found to violate s. 7 of the *Charter*. At pages 978-79, Lamer C.J. held:

Contrairement au présent pourvoi et aux arrêts de notre Cour dans *B.C.G.E.U.*, *Swain* et *Dagenais*, on ne prétendait pas, dans l'arrêt *Salituro*, qu'une règle de common law portait atteinte à un droit garanti par la *Charte*. On alléguait en fait son incompatibilité avec les valeurs fondamentales de la *Charte*. Bien que la Cour, dans l'arrêt *Salituro*, ait tenté de déterminer si, par l'entremise de la *Loi sur la preuve*, le législateur avait voulu préserver la règle de common law, elle n'a pas entrepris une analyse semblable à celle qui serait requise sous le régime de l'article premier pour déterminer si la violation de la *Charte* pouvait se justifier. Elle a plutôt tenté de pondérer, de façon générale et souple, les valeurs en conflit. Dans ses motifs, la Cour a passé en revue les origines de la règle de common law contestée et les justifications avancées en faveur de son maintien. Ces facteurs ont été soupesés en regard du fait que la *Charte* consacre l'égalité des femmes et, plus particulièrement, en regard du concept de la dignité humaine qui inspire la *Charte*. Notre Cour a statué que les valeurs que reflétait la règle de common law n'étaient pas celles de la société contemporaine, lesquelles sont consacrées dans les dispositions de la *Charte*.

Dans *B.C.G.E.U.*, précité, le juge en chef McEachern de la Colombie-Britannique avait, de son propre chef, prononcé une injonction interdisant à un syndicat de faire du piquetage devant le palais de justice: [1983] 6 W.W.R. 640. La règle de common law qui avait permis d'interdire ainsi le piquetage a été jugée contraire à l'al. 2b). Après une analyse traditionnelle sous le régime de l'article premier, la violation a alors été jugée justifiée.

Par la suite, dans *R. c. Swain*, précité, le juge en chef Lamer a fait remarquer que l'analyse selon l'article premier, qui a évolué depuis l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, n'offre pas toujours le cadre indiqué pour évaluer les raisons du maintien d'une règle de common law. Dans *R. c. Swain*, le ministère public invoquait la défense d'aliénation mentale, malgré les objections de l'accusé, sur le fondement de la règle de common law qui autorise une telle procédure. Cette règle a été jugée contraire à l'art. 7 de la *Charte*. Aux pages 978 et 979, le juge en chef Lamer a écrit:

Before turning to s. 1, however, I wish to point out that because this appeal involves a *Charter* challenge to a common law, judge-made rule, the *Charter* analysis involves somewhat different considerations than would apply to a challenge to a legislative provision. For example, having found that the existing common law rule limits an accused's rights under s. 7 of the *Charter*, it may not be strictly necessary to go on to consider the application of s. 1. Having come to the conclusion that the common law rule enunciated by the Ontario Court of Appeal limits an accused's right to liberty in a manner which does not accord with the principles of fundamental justice, it could, in my view, be appropriate to consider at this stage whether an alternative common law rule could be fashioned which would not be contrary to the principles of fundamental justice.

If a new common law rule could be enunciated which would not interfere with an accused person's right to have control over the conduct of his or her defence, I can see no conceptual problem with the Court's simply enunciating such a rule to take the place of the old rule, without considering whether the old rule could nonetheless be upheld under s. 1 of the *Charter*. Given that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken. Of course, if it were not possible to reformulate the common law rule so as to avoid an infringement of a constitutionally protected right or freedom, it would be necessary for the Court to consider whether the common law rule could be upheld as a reasonable limit under s. 1 of the *Charter*.

Nevertheless, in *R. v. Swain*, the formal s. 1 analysis was undertaken since *Oakes*, *supra*, provided a familiar structure for analysis; the constitutional questions were stated with s. 1 in mind and the Court had the benefit of extensive argument on s. 1.

Finally, in *Dagenais*, *supra*, the CBC challenged a publication ban which prevented them from airing one of their programmes. It was held that where the common law rule on publication bans conflicted with *Charter* values, the common law

Avant de passer à l'article premier, j'aimerais toutefois souligner que, puisque le présent pourvoi comporte une contestation fondée sur la *Charte* d'une règle de common law, formulée par les tribunaux, l'analyse de la *Charte* fait intervenir des considérations différentes de celles qui s'appliquent à la contestation d'une disposition législative. Par exemple, la cour ayant conclu que la règle de common law actuelle restreint les droits que l'art. 7 de la *Charte* reconnaît à l'accusé, il n'est peut-être pas strictement nécessaire d'examiner la pertinence de l'application de l'article premier. Après avoir conclu que la règle de common law énoncée par la Cour d'appel de l'Ontario restreint le droit à la liberté de l'accusé d'une façon non conforme aux principes de justice fondamentale, j'estime qu'il conviendrait peut-être de déterminer, à ce stade-ci, s'il est possible de formuler une autre règle de common law qui ne serait pas contraire aux principes de justice fondamentale.

S'il est possible d'énoncer une nouvelle règle de common law qui ne contrevienne pas au droit de l'accusé de contrôler la conduite de sa défense, je n'ai aucune difficulté à imaginer que la Cour puisse simplement la formuler, en remplacement de l'ancienne, sans chercher à savoir si l'ancienne règle pourrait néanmoins être maintenue en vertu de l'article premier de la *Charte*. Vu que la règle de common law a été créée par des juges et non par le législateur, l'égard que les tribunaux doivent avoir envers les organismes élus n'est pas en cause. S'il est possible de reformuler une règle de common law de façon qu'elle ne s'oppose pas aux principes de justice fondamentale, il faudrait le faire. Évidemment, s'il n'était pas possible de reformuler la règle de common law de sorte qu'il n'y ait pas violation d'une liberté ou d'un droit protégé par la Constitution, la Cour devrait alors déterminer si la règle de common law peut être maintenue parce qu'elle constitue une limite raisonnable en vertu de l'article premier de la *Charte*.

Néanmoins, dans *R. c. Swain*, l'analyse formelle selon l'article premier a été faite pour le motif que l'arrêt *Oakes*, précité, proposait un cadre d'analyse familier, que les questions constitutionnelles étaient énoncées en fonction de l'article premier et que la Cour avait le bénéfice d'arguments nombreux sur l'article premier.

Enfin, dans l'arrêt *Dagenais*, précité, la SRC contestait une interdiction de publication qui l'empêchait de diffuser l'un de ses programmes. On a conclu que, lorsque la règle de common law relative aux interdictions de publication entre en con-

rule must be varied in such a manner as to enable the Court to consider both the objective of a publication ban and the proportionality of the ban's effect on protected *Charter* rights. Without adopting a formal s. 1 analysis, it was held that this approach "clearly reflects the substance of the *Oakes* test applicable when assessing legislation under s. 1 of the *Charter*" (p. 878).

In light of these cases, then, it remains to be determined what approach should be followed when, in the context of private litigation with no government action involved, a common law rule is alleged to be inconsistent with the *Charter*.

(ii) Approach That Should Be Followed

It is clear from *Dolphin Delivery*, *supra*, that the common law must be interpreted in a manner which is consistent with *Charter* principles. This obligation is simply a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values. As was said in *Salituro*, *supra*, at p. 678:

The courts are the custodians of the common law, and it is their duty to see that the common law reflects the emerging needs and values of our society.

Historically, the common law evolved as a result of the courts making those incremental changes which were necessary in order to make the law comply with current societal values. The *Charter* represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the *Charter*.

When determining how the *Charter* applies to the common law, it is important to distinguish between those cases in which the constitutionality of government action is challenged, and those in which there is no government action involved. It is important not to import into private litigation the

flit avec les valeurs de la *Charte*, la règle de common law doit être modifiée de manière à permettre à la Cour de considérer à la fois l'objectif d'une interdiction de publication et la proportionnalité de ses effets sur les droits garantis par la *Charte*. Sans adopter une analyse formelle selon l'article premier, la Cour a conclu que cette position «reflète nettement l'essence du critère énoncé dans l'arrêt *Oakes*, et utilisé pour juger une disposition législative en vertu de l'article premier de la *Charte*» (p. 878).

À la lumière de ces décisions, il reste donc à déterminer quelle position adopter lorsque, dans le contexte d'un litige privé où aucune action gouvernementale n'est en cause, on allègue que la règle de common law est contraire à la *Charte*.

(ii) La position à privilégier

Il ressort clairement de l'arrêt *Dolphin Delivery*, précité, que la common law doit être interprétée d'une manière qui soit conforme aux principes de la *Charte*. Cette exigence illustre simplement le pouvoir inhérent qu'ont les tribunaux de modifier ou d'élargir la common law de façon à ce qu'elle respecte les conditions et valeurs sociales contemporaines. Selon l'arrêt *Salituro*, précité, à la p. 678:

Les tribunaux sont les gardiens de la common law et il leur incombe de veiller à ce qu'elle reflète l'évolution des besoins et des valeurs de notre société.

Historiquement, la common law a évolué grâce aux changements progressifs qu'y ont apportés les tribunaux afin que le droit corresponde aux valeurs sociales contemporaines. La *Charte* est une réaffirmation des valeurs fondamentales qui guident et façonnent notre société démocratique et notre régime juridique. Il convient donc que les tribunaux apportent progressivement à la common law des modifications qui permettent de la rendre compatible avec les valeurs énoncées dans la *Charte*.

Lorsqu'il s'agit de déterminer de quelle façon la *Charte* s'applique à la common law, il est important de faire la distinction entre les cas où la constitutionnalité de l'action gouvernementale est contestée, et ceux où il n'y a aucune action gouvernementale. Il y a lieu de veiller à ne pas

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analysis which applies in cases involving government action.

importer dans la sphère du litige privé l'analyse que l'on effectue lorsqu'il y a action gouvernementale.

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In *Dolphin Delivery*, *supra*, it was noted that the *Charter* sets out those specific constitutional duties which the state owes to its citizens. When government action is challenged, whether it is based on legislation or the common law, the cause of action is founded upon a *Charter* right. The claimant alleges that the state has breached its constitutional duty. The state, in turn, must justify that breach. While criminal cases present the prime example of government action, challenges to government action can also arise in civil cases. The state's obligation to uphold its constitutional duties is no less pressing in the civil sphere than in the criminal. The two cases of *B.C.G.E.U.*, *supra*, and *Dagenais*, *supra*, present a very specific type of "government action" in the civil context. In both cases, the Court was called upon to consider the operations of the Court and to determine the extent of its own jurisdiction to consider matters which were essentially public in nature. The cases did not involve strictly private litigation. Therefore, they must be approached with caution when considering what analysis should be applied in purely private civil litigation.

Dans *Dolphin Delivery*, précité, on a signalé que la *Charte* prescrit les obligations constitutionnelles précises auxquelles l'État est tenu envers ses citoyens. Lorsque l'action gouvernementale est contestée, qu'elle repose sur la loi ou sur la common law, la cause d'action est fondée sur un droit garanti par la *Charte*. Le demandeur allègue que l'État a violé son obligation constitutionnelle et, à son tour, l'État doit justifier cette violation. Si les affaires criminelles offrent l'exemple par excellence de l'action gouvernementale, les contestations visant une action gouvernementale peuvent également survenir dans des affaires civiles. Le devoir de l'État de respecter ses obligations constitutionnelles n'est pas moins pressant dans le domaine civil que dans le domaine criminel. Les deux arrêts *B.C.G.E.U.* et *Dagenais*, précités, présentent une forme très particulière d'«action gouvernementale» dans le contexte civil. Dans les deux cas, la Cour a été appelée à considérer son propre fonctionnement et à déterminer la mesure de sa compétence pour considérer des questions essentiellement publiques. Il ne s'agissait pas de litiges purement privés. Pour cette raison, ces deux affaires doivent être considérées avec prudence dans la détermination de l'analyse applicable à un litige civil purement privé.

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Private parties owe each other no constitutional duties and cannot found their cause of action upon a *Charter* right. The party challenging the common law cannot allege that the common law violates a *Charter* right because, quite simply, *Charter* rights do not exist in the absence of state action. The most that the private litigant can do is argue that the common law is inconsistent with *Charter* values. It is very important to draw this distinction between *Charter* rights and *Charter* values. Care must be taken not to expand the application of the *Charter* beyond that established by s. 32(1), either by creating new causes of action, or by subjecting all court orders to *Charter* scrutiny. Therefore, in the context of civil litigation involving only private parties, the *Charter* will "apply" to the common

Les particuliers ne se doivent réciproquement aucune obligation constitutionnelle et ne peuvent fonder leur cause d'action sur un droit garanti par la *Charte*. La partie qui conteste la common law ne peut alléguer que celle-ci viole un droit garanti par la *Charte*, tout simplement parce que les droits garantis par la *Charte* n'existent pas en l'absence d'une action de l'État. Tout ce que le particulier peut prétendre, c'est que la common law est incompatible avec les valeurs de la *Charte*. Il est très important d'établir une distinction entre les droits garantis par la *Charte* et les valeurs de la *Charte*. Il faut prendre soin de ne pas élargir l'application de la *Charte* au-delà de ce qui est établi au par. 32(1), soit en créant de nouvelles causes d'action, soit en assujettissant toutes les ordon-

law only to the extent that the common law is found to be inconsistent with *Charter* values.

Courts have traditionally been cautious regarding the extent to which they will amend the common law. Similarly, they must not go further than is necessary when taking *Charter* values into account. Far-reaching changes to the common law must be left to the legislature.

When the common law is in conflict with *Charter* values, how should the competing principles be balanced? In my view, a traditional s. 1 framework for justification is not appropriate. It must be remembered that the *Charter* “challenge” in a case involving private litigants does not allege the violation of a *Charter* right. It addresses a conflict between principles. Therefore, the balancing must be more flexible than the traditional s. 1 analysis undertaken in cases involving governmental action cases. *Charter* values, framed in general terms, should be weighed against the principles which underlie the common law. The *Charter* values will then provide the guidelines for any modification to the common law which the court feels is necessary.

Finally, the division of onus which normally operates in a *Charter* challenge to government action should not be applicable in a private litigation *Charter* “challenge” to the common law. This is not a situation in which one party must prove a *prima facie* violation of a right while the other bears the onus of defending it. Rather, the party who is alleging that the common law is inconsistent with the *Charter* should bear the onus of proving both that the common law fails to comply with *Charter* values and that, when these values are balanced, the common law should be modified. In the ordinary situation, where government action is said to violate a *Charter* right, it is appropriate that the government undertake the justification for the

nances judiciaires au contrôle fondé sur la *Charte*. Par conséquent, dans le contexte d’un litige civil qui n’oppose que des particuliers, la *Charte* «s’applique» à la common law dans la mesure seulement où elle est jugée incompatible avec les valeurs de la *Charte*.

Les tribunaux ont traditionnellement été prudents quant à l’étendue des modifications à apporter à la common law. De la même manière, ils doivent veiller à ne pas aller plus loin que nécessaire lorsqu’ils tiennent compte des valeurs de la *Charte*. Les changements d’ampleur à la common law doivent être laissés au législateur.

Lorsque la common law entre en conflit avec les valeurs de la *Charte*, comment pondérer les principes opposés? À mon avis, la structure traditionnelle de justification qu’offre l’article premier n’est pas indiquée. Il faut se rappeler que la «contestation» fondée sur la *Charte* dans un litige privé ne repose pas sur la violation d’un droit garanti par la *Charte*. Elle met en cause un conflit entre des principes. Par conséquent, la pondération doit être plus souple que l’analyse traditionnelle effectuée en vertu de l’article premier dans les cas qui mettent en cause une action gouvernementale. Formulées en termes généraux, les valeurs de la *Charte* devraient être pondérées en regard des principes qui inspirent la common law. Les valeurs de la *Charte* offriront alors des lignes directrices quant à toute modification de la common law que la cour estime nécessaire.

Enfin, le partage habituel du fardeau dans la contestation d’une action gouvernementale fondée sur la *Charte* ne devrait pas intervenir dans un litige privé comportant une «contestation» de la common law fondée sur la *Charte*. Il ne s’agit pas d’un cas où une partie doit établir l’existence d’une violation apparente d’un droit alors que l’autre assume le fardeau de la défendre. La partie qui allègue que la common law est incompatible avec la *Charte* doit plutôt établir à la fois que la common law ne respecte pas les valeurs de la *Charte* et que, suivant la pondération de ces valeurs, la common law doit être modifiée. Dans une situation ordinaire, lorsqu’on dit de l’action gouvernementale qu’elle viole un droit garanti par la *Charte*, il

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impugned statute or common law rule. However, the situation is very different where two private parties are involved in a civil suit. One party will have brought the action on the basis of the prevailing common law which may have a long history of acceptance in the community. That party should be able to rely upon that law and should not be placed in the position of having to defend it. It is up to the party challenging the common law to bear the burden of proving not only that the common law is inconsistent with *Charter* values but also that its provisions cannot be justified.

appartient au gouvernement de justifier la loi ou la règle de common law qui est attaquée. En revanche, la situation est toute autre lorsque deux particuliers s'opposent dans une action civile. L'un d'eux aura intenté l'action sur le fondement d'une règle de common law, qui peut être depuis longtemps acceptée au sein de la collectivité. Il devrait donc pouvoir invoquer cette règle de droit sans être tenu de la défendre. Il incombe entièrement à la partie qui conteste la common law de démontrer non seulement que la common law est incompatible avec les valeurs de la *Charte*, mais en outre que ses dispositions ne peuvent être justifiées.

99 With that background, let us first consider the common law of defamation in light of the values underlying the *Charter*.

Forts de ces considérations générales, voyons d'abord la common law de la diffamation à la lumière des valeurs de la *Charte*.

(b) *The Nature of Actions for Defamation: The Values to Be Balanced*

b) *L'action en diffamation: sa nature et les valeurs en cause*

100 There can be no doubt that in libel cases the twin values of reputation and freedom of expression will clash. As Edgerton J. stated in *Sweeney v. Patterson*, 128 F.2d 457 (D.C. Cir. 1942), at p. 458, cert. denied 317 U.S. 678 (1942), whatever is "added to the field of libel is taken from the field of free debate". The real question, however, is whether the common law strikes an appropriate balance between the two. Let us consider the nature of each of these values.

Il ne fait aucun doute que, dans les affaires de libelle, les valeurs jumelles de réputation et de liberté d'expression entreront en conflit. Comme le disait le juge Edgerton dans *Sweeney c. Patterson*, 128 F.2d 457 (D.C. Cir. 1942), à la p. 458, cert. refusé 317 U.S. 678 (1942), [TRADUCTION] «ce que l'on ajoute au domaine du libelle, on le ravit au domaine de la libre discussion». La vraie question, toutefois, est de savoir si la common law offre un juste équilibre entre ces deux valeurs, dont nous examinerons la nature tour à tour.

(i) Freedom of Expression

(i) La liberté d'expression

101 Much has been written of the great importance of free speech. Without this freedom to express ideas and to criticize the operation of institutions and the conduct of individual members of government agencies, democratic forms of government would wither and die. See, for example, *Reference re Alberta Statutes*, [1938] S.C.R. 100, at p. 133; *Switzman v. Elbling*, [1957] S.C.R. 285, at p. 306; and *Boucher v. The King*, [1951] S.C.R. 265, at p. 326. More recently, in *Edmonton Journal*, *supra*, at p. 1336, it was said:

On a beaucoup écrit sur l'importance primordiale de la liberté de parole. Sans cette liberté d'exprimer des idées et de critiquer tant le fonctionnement des institutions que le comportement des particuliers attachés aux offices gouvernementaux, les formes démocratiques de gouvernement se détérioreraient et disparaîtraient. Voir par exemple *Reference re Alberta Statutes*, [1938] R.C.S. 100, à la p. 133; *Switzman c. Elbling*, [1957] R.C.S. 285, à la p. 306; et *Boucher c. The King*, [1951] R.C.S. 265, à la p. 326. On peut lire dans l'arrêt plus récent *Edmonton Journal*, précité, à la p. 1336:

It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized.

However, freedom of expression has never been recognized as an absolute right. Duff C.J. emphasized this point in *Reference re Alberta Statutes*, *supra*, at p. 133:

The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means ... "freedom governed by law." [Emphasis added.]

See also *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067, at pp. 1072 and 1091.

Similar reasoning has been applied in cases argued under the *Charter*. Although a *Charter* right is defined broadly, generally without internal limits, the *Charter* recognizes, under s. 1, that social values will at times conflict and that some limits must be placed even on fundamental rights. As La Forest J. explained in *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, at p. 1489, this Court has adopted a flexible approach to measuring the constitutionality of impugned provisions wherein "the underlying values [of the *Charter*] must be sensitively weighed in a particular context against other values of a free and democratic society ...".

In *R. v. Keegstra*, [1990] 3 S.C.R. 697, for example, s. 319(2) of the *Criminal Code* was found to be justified as a reasonable limit on the appellant's freedom to spread falsehoods relating to the Holocaust and thus to promote hatred

Il est difficile d'imaginer une liberté garantie qui soit plus importante que la liberté d'expression dans une société démocratique. En effet, il ne peut y avoir de démocratie sans la liberté d'exprimer de nouvelles idées et des opinions sur le fonctionnement des institutions publiques. La notion d'expression libre et sans entraves est omniprésente dans les sociétés et les institutions vraiment démocratiques. On ne peut trop insister sur l'importance primordiale de cette notion.

Cependant la liberté d'expression n'a jamais été reconnue comme un droit absolu. Le juge en chef Duff a insisté sur ce point dans *Reference re Alberta Statutes*, précité, à la p. 133:

[TRADUCTION] Le droit au débat public est naturellement soumis à des restrictions juridiques; certaines s'appuient sur des motifs d'ordre public et de décence et d'autres visent la protection de divers intérêts publics et privés dont se préoccupent, par exemple, les lois relatives à la diffamation et à la sédition. En un mot, la liberté de parole signifie [...] «la liberté régie par le droit». [Je souligne.]

Voir également *Cherneskey c. Armadale Publishers Ltd.*, [1979] 1 R.C.S. 1067, aux pp. 1072 et 1091.

On a adopté un raisonnement semblable dans des affaires où la *Charte* était invoquée. Bien qu'un droit garanti par la *Charte* soit défini en termes généraux, d'ordinaire sans limites inhérentes, la *Charte* reconnaît à l'article premier que des valeurs de la société entreront en conflit à certains moments et que des limites doivent être imposées même sur les droits fondamentaux. Comme l'explique le juge La Forest dans *États-Unis d'Amérique c. Cotroni*, [1989] 1 R.C.S. 1469, aux pp. 1489 et 1490, notre Cour a fait preuve de souplesse dans l'appréciation de la constitutionnalité de dispositions contestées, «les valeurs sous-jacentes [de la *Charte* devant] être, dans un contexte particulier, évaluées délicatement en fonction d'autres valeurs propres à une société libre et démocratique ...».

Dans l'arrêt *R. c. Keegstra*, [1990] 3 R.C.S. 697, par exemple, on a jugé que le par. 319(2) du *Code criminel* constituait une limite raisonnable à la liberté de l'appelant de répandre des mensonges sur l'holocauste et de fomenter ainsi la haine con-

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against an identifiable group. Dickson C.J. adopted the contextual approach to s. 1 and concluded that, since hate propaganda contributed little to the values which underlie the right enshrined under s. 2(b), namely the quest for truth, the promotion of individual self-development, and participation in the community, a restriction on this type of expression might be easier to justify than would be the case with other kinds of expression.

tre un groupe identifiable. Le juge en chef Dickson a privilégié une méthode contextuelle relativement à l'article premier et conclu que, puisque la propagande haineuse contribuait peu aux valeurs qui sous-tendent le droit consacré à l'al. 2b), à savoir la recherche de la vérité, l'épanouissement personnel et la participation dans la collectivité, il pouvait être plus aisé de justifier une restriction à cette forme d'expression qu'à d'autres types d'expression.

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In *R. v. Butler*, [1992] 1 S.C.R. 452, the obscenity provisions of the *Criminal Code*, s. 163, were questioned. It was held, under the s. 1 analysis, that pornography could not stand on an equal footing with other kinds of expression which directly engage the "core" values of freedom of expression. Further, it was found that the fact that the targeted material was expression motivated by economic profit more readily justified the imposition of restrictions.

Dans *R. c. Butler*, [1992] 1 R.C.S. 452, on contestait les dispositions du *Code criminel*, art. 163, relatives à l'obscénité. La Cour a conclu que, dans le cadre de l'analyse selon l'article premier, la pornographie ne pouvait se trouver sur un pied d'égalité avec les autres formes d'expression qui font directement appel aux valeurs profondes de la liberté d'expression. En outre, elle a conclu que, puisque les documents en cause étaient une forme d'expression motivée par le profit économique, l'imposition de restrictions était plus aisément justifiée.

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Certainly, defamatory statements are very tenuously related to the core values which underlie s. 2(b). They are inimical to the search for truth. False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society. This concept was accepted in *Globe and Mail Ltd. v. Boland*, [1960] S.C.R. 203, at pp. 208-9, where it was held that an extension of the qualified privilege to the publication of defamatory statements concerning the fitness for office of a candidate for election would be "harmful to that 'common convenience and welfare of society'". Reliance was placed upon the text *Gatley on Libel and Slander in a Civil Action: With Precedents of Pleadings* (4th ed. 1953), at p. 254, wherein the author stated, the following:

On ne peut nier que les déclarations diffamatoires ont un lieu très ténu avec les valeurs profondes qui sous-tendent l'al. 2b). Elles s'opposent à toute recherche de la vérité. Les déclarations fausses et injurieuses ne peuvent contribuer à l'épanouissement personnel, et on ne peut pas dire qu'elles encouragent la saine participation aux affaires de la collectivité. En fait, elles nuisent à l'épanouissement de ces valeurs et aux intérêts d'une société libre et démocratique. Ce concept a été reconnu dans *Globe and Mail Ltd. c. Boland*, [1960] R.C.S. 203, aux pp. 208 et 209, où il est déclaré qu'étendre la portée de l'immunité relative à la publication de déclarations diffamatoires sur la compétence d'un candidat à une élection serait [TRADUCTION] «nuisible à «l'intérêt et au bien-être communs de la société»». On a invoqué l'ouvrage *Gatley on Libel and Slander in a Civil Action: With Precedents of Pleadings* (4^e éd. 1953), à la p. 254, où l'auteur s'exprime dans les termes suivants:

It would tend to deter sensitive and honourable men from seeking public positions of trust and responsibility,

[TRADUCTION] On risquerait de dissuader l'homme sensé et respectable de se porter candidat aux postes publics

and leave them open to others who have no respect for their reputation.

See also *Derrickson v. Tomat* (1992), 88 D.L.R. (4th) 401 (B.C.C.A.), at p. 408.

(ii) The Reputation of the Individual

The other value to be balanced in a defamation action is the protection of the reputation of the individual. Although much has very properly been said and written about the importance of freedom of expression, little has been written of the importance of reputation. Yet, to most people, their good reputation is to be cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws. In order to undertake the balancing required by this case, something must be said about the value of reputation.

Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.

From the earliest times, society has recognized the potential for tragic damage that can be occasioned by a false statement made about a person. This is evident in the Bible, the Mosaic Code and the Talmud. As the author Carter-Ruck, in *Carter-Ruck on Libel and Slander* (4th ed. 1992), explains at p. 17:

The earliest evidence in recorded history of any sanction for defamatory statements is in the Mosaic code. In *Exodus* XXII 28 we find 'Thou shalt not revile the gods nor curse the ruler of thy people' and in *Exodus* XXIII 1 'Thou shalt not raise a false report: put not thine hand with the wicked to be an unrighteous witness'. There is also a condemnation of rumourmongers in *Leviticus*

de confiance et de responsabilité, qui seraient alors laissés à ceux qui n'ont aucune considération pour leur réputation.

Voir également *Derrickson c. Tomat* (1992), 88 D.L.R. (4th) 401 (C.A.C.-B.), à la p. 408.

(ii) La réputation de la personne

L'action en diffamation commande la considération d'une seconde valeur, la protection de la réputation de la personne. Bien que de nombreux commentaires judiciaires aient été formulés sur l'importance de la liberté d'expression, on ne peut en dire autant de la réputation. Pourtant, la plupart des gens tiennent plus que tout à leur bonne réputation, qui se rattache étroitement à la valeur et à la dignité innées de la personne. Elle est un attribut qui doit, au même titre que la liberté d'expression, être protégé par les lois de la société. Avant d'effectuer la pondération requise en l'espèce, il convient de parler de la valeur de la réputation.

Les démocraties ont toujours reconnu et révéral'importance fondamentale de la personne. Cette importance doit, à son tour, reposer sur la bonne réputation. Cette bonne réputation, qui rehausse le sens de valeur et de dignité d'une personne, peut également être très rapidement et complètement détruite par de fausses allégations. Et une réputation ternie par le libelle peut rarement regagner son lustre passé. Une société démocratique a donc intérêt à s'assurer que ses membres puissent jouir d'une bonne réputation et la protéger aussi longtemps qu'ils en sont dignes.

Depuis toujours, la société a reconnu le tort tragique que les fausses déclarations peuvent causer à une personne. On peut le constater à la lecture de la Bible, de la loi mosaïque et du Talmud. Ainsi que l'auteur Carter-Ruck l'explique, dans *Carter-Ruck on Libel and Slander* (4^e éd. 1992), à la p. 17:

[TRADUCTION] La première indication, dans l'histoire écrite, de sanctions contre les déclarations diffamatoires remonte à la loi mosaïque. Dans l'Exode, XXII, verset 28, on lit: «Tu ne maudiras point Dieu, et tu ne maudiras point le prince de ton peuple»; dans l'Exode, XXIII, verset 1: «Tu ne répandras point de faux bruit. Tu ne te joindras point au méchant pour faire un faux témoi-

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XIX 16 'Thou shalt not go up and down as a talebearer among thy people'.

gnage». Dans le Lévitique, XIX, verset 16, on condamne également l'auteur de rumeurs: «Tu ne répandras point de calomnies parmi ton peuple».

110 To make false statements which are likely to injure the reputation of another has always been regarded as a serious offence. During the Roman era, the punishment for libel varied from the loss of the right to make a will, to imprisonment, exile for life, or forfeiture of property. In the case of slander, a person could be made liable for payment of damages.

Tenir des propos mensongers susceptibles de ternir la réputation d'autrui a toujours été considéré comme une infraction grave. À l'époque romaine, la punition pour le libelle variait de la perte du droit de tester à l'emprisonnement, et de l'exil à vie à la confiscation des biens. Dans le cas de la diffamation, l'auteur pouvait être condamné à des dommages-intérêts.

111 It was decreed by the Teutons in the *Lex Salica* that if a man called another a "wolf" or a "hare", he must pay the sum of three shillings; for a false imputation of unchastity in a woman the penalty was 45 shillings. In the *Normal Costumal*, if people falsely called another "thief" or "manslayer", they had to pay damages and, holding their nose with their fingers, publicly confess themselves a liar.

La Loi salique des Teutons prescrivait que l'homme qui traitait un autre homme de «loup» ou de «lièvre» devait verser la somme de trois shillings; pour une fausse accusation relative à la chasteté d'une femme, la pénalité s'élevait à 45 shillings. Dans le *Normal Costumal*, celui qui traitait faussement autrui de «voleur» ou de «meurtrier» était tenu de verser des dommages-intérêts et, en se tenant le nez, de confesser publiquement qu'il était un menteur.

112 With the separation of ecclesiastical and secular courts by the decree of William I following the Norman conquest, the Church assumed spiritual jurisdiction over defamatory language, which was regarded as a sin. The Church "stayed the tongue of the defamer at once *pro custodia morum* of the community, and *pro salute animæ* of the delinquent". See V. V. Veeder, "The History and Theory of the Law of Defamation" (1903), 3 *Colum. L. Rev.* 546, at p. 551.

Par suite de la séparation des tribunaux ecclésiastiques et séculiers en vertu du décret de Guillaume 1^{er} après la conquête normande, l'Église a assumé la compétence spirituelle à l'égard du langage diffamatoire, considéré alors comme un péché. L'Église [TRADUCTION] «faisait taire l'auteur de la diffamation, à la fois *pro custodia morum* de la collectivité et *pro salute animæ* du délinquant»: V. V. Veeder, «The History and Theory of the Law of Defamation» (1903), 3 *Colum. L. Rev.* 546, à la p. 551.

113 By the 16th century, the common law action for defamation became commonplace. This was in no small measure due to the efforts of the Star Chamber to eradicate duelling, the favoured method of vindication. The Star Chamber even went so far as to punish the sending of challenges. However, when it proscribed this avenue of recourse to injured parties, the Star Chamber was compelled to widen its original jurisdiction over seditious libel to include ordinary defamation.

Au XVI^e siècle, l'action en diffamation en common law est devenue chose commune en raison, dans une large mesure, des efforts de la Chambre étoilée pour bannir les duels, moyen préféré de justification. La Chambre étoilée sanctionnait même les mises au défi. Toutefois, lorsqu'elle a nié cette voie de recours aux parties lésées, la Chambre étoilée a été contrainte d'élargir sa compétence originale à l'égard du libelle séditieux pour l'étendre à la simple diffamation.

114 The modern law of libel is said to have arisen out of the case *De Libellis Famosis* (1605), 5 Co.

On dit du droit moderne du libelle qu'il tire ses origines de l'affaire *De Libellis Famosis* (1605), 5

Rep. 125a, 77 E.R. 250. There, the late Archbishop of Canterbury and the then Bishop of London were alleged to have been "traduced and scandalized" by an anonymous person. As reported by Coke, it was ruled that all libels, even those against private individuals, ought to be sanctioned severely by indictment at common law or in the Star Chamber. The reasoning behind this was that the libel could incite "all those of the same family, kindred, or society to revenge, and so tends *per consequens* to quarrels and breach of the peace" (p. 251). It was not necessary to show publication to a third person and it made no difference whether the libel was true or whether the plaintiff had a good or bad reputation. Eventually, truth was recognized as a defence in cases involving ordinary defamation.

It was not until the late 17th century that the distinction between libel and slander was drawn by Chief Baron Hale in *King v. Lake* (1679), Hardres 470, 145 E.R. 552, where it was held that words spoken, without more, would not be actionable, with a few exceptions. Once they were reduced to writing, however, malice would be presumed and an action would lie.

The character of the law relating to libel and slander in the 20th century is essentially the product of its historical development up to the 17th century, subject to a few refinements such as the introduction and recognition of the defences of privilege and fair comment. From the foregoing we can see that a central theme through the ages has been that the reputation of the individual is of fundamental importance. As Professor R. E. Brown writes in *The Law of Defamation in Canada* (2nd ed. 1994), at p. 1-4:

"(N)o system of civil law can fail to take some account of the right to have one's reputation remain untarnished by defamation." Some form of legal or social constraints on defamatory publications "are to be found in all stages of civilization, however imperfect, remote, and proximate to barbarism." [Footnotes omitted.]

Co. Rep. 125a, 77 E.R. 250. On alléguait dans cette affaire que l'ex-archevêque de Canterbury et l'évêque de Londres d'alors avaient été victimes de «calomnies et de médisances» de la part d'un inconnu. Ainsi que le rapporte Coke, il a été jugé que tous les libelles, même ceux commis contre des particuliers, devaient être punis sévèrement par mise en accusation en common law ou devant la Chambre étoilée. C'est que l'on craignait que le libelle incite [TRADUCTION] «tous les membres de la même famille, les parents ou la société à se venger et par conséquent à se quereller et à troubler la paix» (p. 251). Il n'était pas nécessaire de montrer la publication à une tierce personne, et il importait peu que le libelle soit véridique ou que le demandeur jouisse d'une bonne ou d'une mauvaise réputation. Par la suite, la vérité a été reconnue comme moyen de défense dans les affaires de simple diffamation.

Ce n'est qu'à la fin du XVII^e siècle que la distinction entre le libelle et la diffamation a été établie par le juge en chef Hale dans *King c. Lake* (1679), Hardres 470, 145 E.R. 552, où il a conclu que les paroles proférées, sans plus, ne pourraient faire l'objet de poursuites, sauf à quelques exceptions. Toutefois s'il s'agissait d'un écrit on présumait la malveillance, et une action pouvait être intentée.

Le droit relatif au libelle et à la diffamation au XX^e siècle est essentiellement le produit de son évolution jusqu'au XVII^e siècle, sous réserve de quelques modifications comme l'introduction et la reconnaissance des défenses d'immunité et de commentaire loyal. De ce qui précède, on peut constater à travers les âges le thème central de l'importance fondamentale de la réputation de la personne. Comme le dit le professeur R. E. Brown dans *The Law of Defamation in Canada* (2^e éd. 1994), à la p. 1-4:

[TRADUCTION] «(A)ucun régime de droit civil ne peut ignorer le droit d'une personne à la protection de sa réputation contre la diffamation.» On trouve des restrictions juridiques ou sociales aux publications diffamatoires «à toutes les étapes de la civilisation, aussi imparfaites, éloignées et proches de la barbarie soient-elles». [Notes omises.]

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Though the law of defamation no longer serves as a bulwark against the duel and blood feud, the protection of reputation remains of vital importance. As David Lepofsky suggests in "Making Sense of the Libel Chill Debate: Do Libel Laws 'Chill' the Exercise of Freedom of Expression?" (1994), 4 *N.J.C.L.* 169, at p. 197, reputation is the "fundamental foundation on which people are able to interact with each other in social environments". At the same time, it serves the equally or perhaps more fundamentally important purpose of fostering our self-image and sense of self-worth. This sentiment was eloquently expressed by Stewart J. in *Rosenblatt v. Baer*, 383 U.S. 75 (1966), who stated at p. 92:

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty.

118

In the present case, consideration must be given to the particular significance reputation has for a lawyer. The reputation of a lawyer is of paramount importance to clients, to other members of the profession and to the judiciary. A lawyer's practice is founded and maintained upon the basis of a good reputation for professional integrity and trustworthiness. It is the cornerstone of a lawyer's professional life. Even if endowed with outstanding talent and indefatigable diligence, a lawyer cannot survive without a good reputation. In his essay entitled "The Lawyer's Duty to Himself and the Code of Professional Conduct" (1993), 27 *L. Soc. Gaz.* 119, David Hawreluk described the importance of a reputation for integrity. At page 121, he quoted Lord Birkett on the subject:

The advocate has a duty to his client, a duty to the Court, and a duty to the State; but he has above all a duty to himself and he shall be, as far as lies in his power, a man of integrity. No profession calls for higher standards of honour and uprightness, and no profession, perhaps, offers greater temptations to forsake them; but whatever gifts an advocate may possess, be they never so dazzling, without the supreme

Bien que le droit de la diffamation ne serve plus de rempart contre le duel et les conflits sanguinaires, la protection de la réputation demeure d'importance vitale. Comme l'indique David Lepofsky dans «Making Sense of the Libel Chill Debate: Do Libel Laws «Chill» the Exercise of Freedom of Expression?» (1994), 4 *N.J.C.L.* 169, à la p. 197, la réputation est le [TRADUCTION] «pilier fondamental grâce auquel les gens peuvent interagir avec autrui en milieu social». Du même coup, il sert l'objectif aussi fondamentalement important, voire même plus, de protéger l'image de soi d'un individu et son sens de sa valeur propre. Ce sentiment a été exprimé avec éloquence par le juge Stewart dans *Rosenblatt c. Baer*, 383 U.S. 75 (1966), qui écrit à la p. 92:

[TRADUCTION] Le droit d'un homme à la protection de sa réputation contre toute intrusion injustifiée et tout préjudice illégal ne reflète rien de plus que notre concept fondamental de dignité et de valeur essentielles à tout être humain — un concept à la base de tout système acceptable de liberté ordonnée.

En l'espèce, il faut tenir compte de l'importance particulière que revêt la réputation pour l'avocat. La réputation d'un avocat est d'une importance primordiale vis-à-vis des clients, des membres de la profession et de la magistrature. L'avocat monte sa pratique et la maintient grâce à sa réputation d'intégrité et de conscience professionnelles. Elle est la pierre angulaire de sa vie professionnelle. Même doué d'un talent exceptionnel et faisant preuve d'une diligence de tout instant, l'avocat ne peut survivre sans une réputation irréprochable. Dans son essai intitulé «The Lawyer's Duty to Himself and the Code of Professional Conduct» (1993), 27 *L. Soc. Gaz.* 119, David Hawreluk décrit l'importance d'une réputation d'intégrité. À la p. 121, il reprend les propos de lord Birkett sur ce point:

[TRADUCTION] L'avocat a une obligation envers son client, la Cour et l'État; mais par-dessus tout, il a une obligation envers lui-même, celle de faire preuve, autant que possible, d'intégrité. Aucune profession n'exige un degré plus élevé de probité et d'intégrité, et aucune profession n'offre peut-être de plus fortes tentations d'y renoncer; mais quels que soient les talents d'un avocat, aussi éclatants puissent-ils être,

qualification of an inner integrity he will fall short of the highest . . .

Similarly, Esson J. in *Vogel v. Canadian Broadcasting Corp.*, [1982] 3 W.W.R. 97 (B.C.S.C.), at pp. 177-78 stated:

The qualities required of a lawyer who aspires to the highest level of his profession are various, but one is essential. That is a reputation for integrity. The programs were a massive attack upon that reputation. The harm done to it can never be wholly undone, and therefore the stigma so unfairly created will always be with the plaintiff.

When the details of the Vogel affair have faded from memory, what will remain in the minds of many people throughout Canada is a lurking recollection that he was the centre of a scandal which arose out of his conduct in office.

Although it is not specifically mentioned in the *Charter*, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society.

Further, reputation is intimately related to the right to privacy which has been accorded constitutional protection. As La Forest J. wrote in *R. v. Dyment*, [1988] 2 S.C.R. 417, at p. 427, privacy, including informational privacy, is "[g]rounded in man's physical and moral autonomy" and "is essential for the well-being of the individual". The publication of defamatory comments constitutes an invasion of the individual's personal privacy and is an affront to that person's dignity. The protection of a person's reputation is indeed worthy of protection in our democratic society and must be carefully balanced against the equally important right of freedom of expression. In order to undertake the requisite balancing of values, let us first review the change to the existing common law proposed by the appellants.

s'il n'a pas cette qualité suprême qu'est l'intégrité intérieure, il n'atteindra pas les sommets . . .

De même, le juge Esson dans *Vogel c. Canadian Broadcasting Corp.*, [1982] 3 W.W.R. 97 (C.S.C.-B.), aux pp. 177 et 178, écrit:

[TRADUCTION] L'avocat qui aspire au sommet de sa profession doit être doué de plusieurs qualités, dont l'une est essentielle. Il s'agit de la réputation d'intégrité. Les programmes ont sévèrement attaqué cette réputation. Le tort causé à celle-ci ne peut jamais être complètement réparé, et par conséquent, les stigmates si injustement infligés demeureront toujours.

Lorsque le temps aura estompé le souvenir des détails entourant l'affaire Vogel, il ne restera dans l'esprit de nombreux Canadiens que le vague souvenir d'un scandale né de son comportement dans l'exercice de ses fonctions.

Bien qu'elle ne soit pas expressément mentionnée dans la *Charte*, la bonne réputation de l'individu représente et reflète sa dignité inhérente; concept qui sous-tend tous les droits garantis par la *Charte*. La protection de la bonne réputation d'un individu est donc d'importance fondamentale dans notre société démocratique.

En outre, la réputation est étroitement liée au droit à la vie privée, qui jouit d'une protection constitutionnelle. Comme le juge La Forest le dit dans *R. c. Dyment*, [1988] 2 R.C.S. 417, à la p. 427, la vie privée, y compris la vie privée sur le plan de l'information, est «[f]ondée sur l'autonomie morale et physique de la personne» et «est essentielle à son bien-être». La publication de commentaires diffamatoires constitue une intrusion dans la vie privée d'un individu et un affront à sa dignité. La réputation d'une personne mérite effectivement d'être protégée dans notre société démocratique et cette protection doit être soigneusement mesurée en regard du droit tout aussi important à la liberté d'expression. Aux fins de la nécessaire pondération de ces valeurs, voyons d'abord le changement que les appelants proposent à la common law actuelle.

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(c) *The Proposed Remedy: Adopting the New York Times v. Sullivan "Actual Malice" Rule*

c) *Solution proposée: La règle de la «malveillance véritable» selon New York Times c. Sullivan*

122 In *New York Times v. Sullivan*, *supra*, the United States Supreme Court ruled that the existing common law of defamation violated the guarantee of free speech under the First Amendment of the Constitution. It held that the citizen's right to criticize government officials is of such tremendous importance in a democratic society that it can only be accommodated through the tolerance of speech which may eventually be determined to contain falsehoods. The solution adopted was to do away with the common law presumptions of falsity and malice and place the onus on the plaintiff to prove that, at the time the defamatory statements were made, the defendant either knew them to be false or was reckless as to whether they were or not.

Dans l'arrêt *New York Times c. Sullivan*, précité, la Cour suprême des États-Unis a statué que la common law de la diffamation alors en vigueur violait la garantie de liberté de parole prévue au Premier amendement de la Constitution. Elle a conclu que le droit du citoyen de critiquer les représentants du gouvernement revêt une importance si exceptionnelle dans une société démocratique que son respect passe nécessairement par la tolérance du propos qui, à la fin, peut être jugé mensonger. La solution adoptée consistait à supprimer les présomptions de fausseté et de malveillance existant en common law, et à imposer au demandeur le fardeau d'établir qu'à l'époque où les propos diffamatoires ont été tenus, le défendeur savait qu'ils étaient faux ou ne se souciait pas de savoir s'ils l'étaient ou non.

123 At the outset, it is important to understand the social and political context of the times which undoubtedly influenced the decision in *New York Times v. Sullivan*, *supra*. The impugned publication was an editorial advertisement, placed in the appellant's newspaper, entitled "Heed Their Rising Voices". It criticized the widespread segregation which continued to dominate life in the southern states in the late 1950s and early 1960s. Prominent and well respected individuals, including Mrs. Eleanor Roosevelt, lent their name to the advertisement. It communicated information, recited grievances, protested abuses and sought financial support. The group or movement sponsoring the advertisement was characterized by Brennan J. as one "whose existence and objectives are matters of the highest public interest and concern" (p. 266). Black J. described the controversy at the heart of the suit in the following terms at p. 294:

Avant tout, il importe de saisir le contexte social et politique qui, à cette époque, a certainement influencé la décision *New York Times c. Sullivan*, précitée. La publication attaquée, une publicité rédactionnelle intitulée «Heed Their Rising Voices», avait été placée dans le journal de l'appellant. On y critiquait la ségrégation qui, sur une grande échelle, continuait à dominer la vie des États du sud à la fin des années 1950 et au début des années 1960. Des personnalités connues et respectées, comme M^{me} Eleanor Roosevelt, avaient prêté leur nom à la publicité, laquelle divulguait certains renseignements, énonçait des griefs, dénonçait des abus et demandait un appui financier. Le juge Brennan a dit de l'existence et de l'objectif du groupe ou mouvement appuyant la publicité qu'il relevait [TRADUCTION] «du plus haut intérêt public» (p. 266). Le juge Black a décrit dans les termes suivants la controverse au cœur de laquelle se trouvait l'action à la p. 294:

One of the acute and highly emotional issues in this country arises out of efforts of many people, even including some public officials, to continue state-commanded segregation of races in the public schools and other public places, despite our several holdings that

[TRADUCTION] L'un des sujets les plus brûlants et chargés d'émotion dans notre pays découle des efforts de nombreuses personnes, dont même certains représentants officiels, à perpétuer au nom de l'État la ségrégation des races dans les écoles publiques et autres

such a state practice is forbidden by the Fourteenth Amendment.

The advertisement did not mention by name the plaintiff, who was a white elected commissioner from Montgomery, Alabama. Only 35 copies of the edition of the *New York Times* which carried that advertisement were circulated in Montgomery, and only 394 were circulated in the entire state of Alabama. The trial took place in 1960, in a segregated court room in Montgomery, before a white judge and all-white jury. Damages of \$500,000 U.S. were awarded. This would be the current equivalent in Canada of approximately \$3.5 million.

The Supreme Court, in overturning the verdict, clearly perceived the libel action as a very serious attack not only on the freedom of the press but, more particularly, on those who favoured desegregation in the southern United States. It was concerned that such a large damage award could threaten the very existence of, in Black J.'s words, "an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials" (p. 294). This concern was intensified by the fact that a second libel verdict of \$500,000 U.S. had already been awarded to another Montgomery commissioner against the *New York Times*. In addition, 11 other libel suits, arising out of the same advertisement, were pending against the newspaper.

Another motivating factor for this radical change to the common law was the American jurisprudence to the effect that the statements of public officials which came "within the outer perimeter of their duties" were privileged unless actual malice was proved. The rationale behind this privilege was that the threat of damage suits would "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties": *Barr v. Matteo*, 360 U.S. 564 (1959), at p. 571. The Supreme Court in the

endroits publics, en dépit de plusieurs décisions déclarant cette pratique interdite en vertu du Quatrième Amendement.

La publicité ne révélait pas le nom du demandeur, un commissaire blanc élu, de Montgomery, en Alabama. Seulement 35 exemplaires de l'édition du *New York Times* contenant la publicité avaient été diffusés à Montgomery, et 394 seulement l'avaient été dans tout l'État de l'Alabama. Le procès s'était déroulé en 1960 à Montgomery dans une salle d'audience où se pratiquait la ségrégation, devant un juge blanc et un jury formé exclusivement de personnes de race blanche. Des dommages-intérêts de 500 000 \$ U.S. ont été adjugés. Aujourd'hui, cette somme équivaldrait au Canada à environ 3,5 millions de dollars.

La Cour suprême, qui a écarté le verdict, a manifestement perçu l'action en libelle comme une grave attaque contre non seulement la liberté de la presse, mais plus particulièrement, contre les partisans de la déségrégation dans le sud des États-Unis. Elle craignait qu'un montant aussi élevé de dommages-intérêts menace l'existence même, selon les termes du juge Black, [TRADUCTION] «d'une presse américaine suffisamment courageuse pour publier des opinions impopulaires sur les affaires publiques et suffisamment forte pour critiquer le comportement de représentants officiels» (p. 294). Cette crainte était d'autant plus vive qu'un second verdict de libelle accordant une somme de 500 000 \$ U.S. avait déjà été prononcé en faveur d'un autre commissaire de Montgomery contre le *New York Times*. Par ailleurs, 11 autres actions pour libelle, procédant de la même publicité, étaient en instance contre le journal.

Ce changement radical dans la common law était également motivé par la jurisprudence américaine portant que les déclarations de représentants officiels qui demeurent [TRADUCTION] «dans le périmètre extérieur de leurs fonctions» sont protégées, à moins que l'on établisse la malveillance véritable. La raison d'être de cette immunité était que la menace d'actions en dommages-intérêts [TRADUCTION] «atténuerait l'ardeur de tous, à l'exception des plus résolus ou encore des plus irresponsables, dans l'exécution inébranlable de leurs

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Sullivan decision held that analogous considerations supported the protection which it accorded to critics of the government.

(d) *Critiques of the "Actual Malice" Rule*

(i) Comments on the Decision in the United States

fonctions»: *Barr c. Matteo*, 360 U.S. 564 (1959), à la p. 571. La Cour suprême a conclu dans *Sullivan* que des considérations analogues justifiaient la protection qu'elle accordait aux personnes qui critiquaient le gouvernement.

d) *Critiques à l'endroit de la règle de la «malveillance véritable»*

(i) Commentaires formulés aux États-Unis

The "actual malice" rule has been severely criticized by American judges and academic writers. It has been suggested that the decision was overly influenced by the dramatic facts underlying the dispute and has not stood the test of time. See, for example, R. A. Epstein, "Was *New York Times v. Sullivan* Wrong?" (1986), 53 *U. Chi. L. Rev.* 782, at p. 787; *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), at p. 767. Commentators have pointed out that, far from being deterred by the decision, libel actions have, in the post-*Sullivan* era, increased in both number and size of awards. They have, in this way, mirrored the direction taken in other tort actions. See Epstein, *supra*; R. P. Bezanson, "Libel Law and the Realities of Litigation: Setting the Record Straight" (1985), 71 *Iowa L. Rev.* 226, at pp. 228-29. It has been said that the *New York Times v. Sullivan*, decision has put great pressure on the fact-finding process since courts are now required to make subjective determinations as to who is a public figure and what is a matter of legitimate public concern. See Christie, *supra*, at pp. 63-64.

La règle de la «malveillance véritable» a été sévèrement critiquée, tant par les juges américains que par les auteurs. D'aucuns ont donné à entendre que la décision avait été excessivement influencée par les faits dramatiques qui avaient déclenché du litige et qu'elle n'a pas résisté au passage du temps. Voir par exemple R. A. Epstein, «Was *New York Times v. Sullivan* Wrong?» (1986), 53 *U. Chi. L. Rev.* 782, à la p. 787; *Dun & Bradstreet, Inc. c. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), à la p. 767. Les auteurs ont souligné que, loin de décourager les actions en libelle, l'arrêt *Sullivan* a entraîné une augmentation à la fois du nombre d'actions intentées et des montants adjugés. En ce sens, elles suivent les tendances des autres actions délictuelles. Voir Epstein, *loc. cit.*; R. P. Bezanson, «Libel Law and the Realities of Litigation: Setting the Record Straight» (1985), 71 *Iowa L. Rev.* 226, aux pp. 228 et 229. On a dit que l'arrêt *New York Times c. Sullivan* avait imposé une pression énorme sur le processus de recherche des faits puisque les tribunaux sont maintenant tenus de déterminer de façon subjective qui est une personnalité publique et quelle question met légitimement en cause l'intérêt public. Voir Christie, *loc. cit.*, aux pp. 63 et 64.

Perhaps most importantly, it has been argued the decision has shifted the focus of defamation suits away from their original, essential purpose. Rather than deciding upon the truth of the impugned statement, courts in the U.S. now determine whether the defendant was negligent. Several unfortunate results flow from this shift in focus. First, it may deny the plaintiff the opportunity to establish the falsity of the defamatory statements and to determine the consequent reputational harm. This is

Avant tout, on a soutenu que la décision avait eu pour effet de détourner les actions en diffamation de leur objectif original et essentiel. Plutôt que de se prononcer sur la vérité des propos contestés, les tribunaux des États-Unis doivent déterminer maintenant si le défendeur a fait preuve de négligence. Ce changement d'optique engendre plusieurs résultats malencontreux. Premièrement, on risque de nier au demandeur la possibilité d'établir la fausseté des déclarations diffamatoires et de déter-

particularly true in cases where the falsity is not seriously contested. See Bezanson, *supra*, at p. 227.

Second, it necessitates a detailed inquiry into matters of media procedure. This, in turn, increases the length of discoveries and of the trial which may actually increase, rather than decrease, the threat to speech interests. See D. A. Barrett, "Declaratory Judgments for Libel: A Better Alternative" (1986), 74 *Cal. L. Rev.* 847, at p. 855.

Third, it dramatically increases the cost of litigation. This will often leave a plaintiff who has limited funds without legal recourse. See P. N. Leval, "The No-Money, No-Fault Libel Suit: Keeping *Sullivan* in its Proper Place" (1988), 101 *Harv. L. Rev.* 1287, at p. 1288; A. Lewis, "*New York Times v. Sullivan* Reconsidered: Time to Return to 'The Central Meaning of the First Amendment'" (1983), 83 *Colum. L. Rev.* 603; M. London, "The 'Muzzled Media': Constitutional Crisis or Product Liability Scam?" in *At What Price? Libel Law and Freedom of the Press* (1993), at pp. 17-20.

Fourth, the fact that the dissemination of falsehoods is protected is said to exact a major social cost by deprecating truth in public discourse. See L. C. Bollinger, "The End of *New York Times v. Sullivan*: Reflections on *Masson v. New Yorker Magazine*", [1991] *Sup. Ct. Rev.* 1, at p. 6; J. A. Barron, "Access to the Press — A New First Amendment Right" (1966-67), 80 *Harv. L. Rev.* 1641, at pp. 1657-58.

A number of jurists in the United States have advocated a reconsideration of the *New York Times v. Sullivan* standard. These include one of the justices of the Supreme Court who participated in that decision. In *Dun & Bradstreet, Inc.*, *supra*, White J. stated, in a minority concurring opinion with which Burger C.J. concurred on this point, that he had "become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully

miner le tort ainsi causé à sa réputation. C'est particulièrement vrai dans les cas où la fausseté n'est pas sérieusement contestée. Voir Bezanson, *loc. cit.*, à la p. 227.

Deuxièmement, cela force la tenue d'une enquête approfondie sur des questions de procédure médiatique. De ce fait, on prolonge la durée des enquêtes préalables et du procès, ce qui est susceptible d'accentuer plutôt que de réduire la menace qui pèse sur le droit de parole. Voir D. A. Barrett, «Declaratory Judgments for Libel: A Better Alternative» (1986), 74 *Cal. L. Rev.* 847, à la p. 855.

Troisièmement, le coût des litiges s'en trouve considérablement accru. Le demandeur dont les ressources sont restreintes sera fréquemment privé de tout recours juridique. Voir P. N. Leval, «The No-Money, No-Fault Libel Suit: Keeping *Sullivan* in its Proper Place» (1988), 101 *Harv. L. Rev.* 1287, à la p. 1288; A. Lewis, «*New York Times v. Sullivan* Reconsidered: Time to Return to 'The Central Meaning of the First Amendment'» (1983), 83 *Colum. L. Rev.* 603; M. London, «The «Muzzled Media»: Constitutional Crisis or Product Liability Scam?» dans *At What Price? Libel Law and Freedom of the Press* (1993), aux pp. 17 à 20.

Quatrièmement, on dit que la protection de la diffusion de déclarations fausses impose un coût social considérable en dévalorisant la vérité du discours public. Voir L. C. Bollinger, «The End of *New York Times v. Sullivan*: Reflections on *Masson v. New Yorker Magazine*», [1991] *Sup. Ct. Rev.* 1, à la p. 6; J. A. Barron, «Access to the Press — A New First Amendment Right» (1966-67), 80 *Harv. L. Rev.* 1641, aux pp. 1657 et 1658.

Nombre de juristes aux États-Unis préconisent la révision de la norme énoncée dans *New York Times c. Sullivan*. L'un d'entre eux était au nombre des juges de la Cour suprême qui ont participé à cette décision. Dans *Dun & Bradstreet, Inc.*, précité, le juge White, dans des motifs minoritaires concordants auxquels le juge en chef Burger a souscrit sur ce point, a déclaré qu'il était [TRADUCTION] «convaincu que la cour a établi une pondération imprévoyante dans l'affaire *New York Times*

129

130

131

132

informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation" (p. 767). He went on to state at pp. 767-69:

In a country like ours, where the people purport to be able to govern themselves through their elected representatives, adequate information about their government is of transcendent importance. That flow of intelligence deserves full First Amendment protection. Criticism and assessment of the performance of public officials and of government in general are not subject to penalties imposed by law. But these First Amendment values are not at all served by circulating false statements of fact about public officials. On the contrary, erroneous information frustrates these values. They are even more deserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government. As the Court said in *Gertz*: "(T)here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." . . . Yet in *New York Times* cases, the public official's complaint will be dismissed unless he alleges and makes out a jury case of a knowing or reckless falsehood. Absent such proof, there will be no jury verdict or judgment of any kind in his favor, even if the challenged publication is admittedly false. The lie will stand, and the public continue to be misinformed about public matters. . . . Furthermore, when the plaintiff loses, the jury will likely return a general verdict and there will be no judgment that the publication was false, even though it was without foundation in reality. The public is left to conclude that the challenged statement was true after all. Their only chance of being accurately informed is measured by the public official's ability himself to counter the lie, unaided by the courts. That is a decidedly weak reed to depend on for the vindication of First Amendment interests . . .

Also, by leaving the lie uncorrected, the *New York Times* rule plainly leaves the public official without a remedy for the damage to his reputation. Yet the Court has observed that the individual's right to the protection of his own good name is a basic consideration of our

entre le droit du public d'être pleinement renseigné sur les représentants officiels et sur les affaires publiques, et le droit opposé des victimes de diffamation de défendre leur réputation» (p. 767). Puis il a ajouté, aux pp. 767 à 769:

[TRADUCTION] Dans un pays comme le nôtre, où les citoyens prétendent être en mesure de gouverner par l'intermédiaire de représentants élus, il est d'importance transcendantale d'être suffisamment informé sur le gouvernement. Tous ces renseignements méritent la pleine protection du Premier amendement. La critique et l'évaluation de la prestation des représentants officiels et du gouvernement en général ne sont pas susceptibles d'être pénalisés par la loi. Toutefois, ces valeurs du Premier amendement ne sont aucunement servies par la diffusion de fausses déclarations de fait sur des représentants officiels. Bien au contraire, les faux renseignements contre-carrent ces valeurs, lesquelles sont d'autant plus mal servies lorsque les déclarations attaquent faussement l'honnêteté d'hommes et de femmes et anéantissent ainsi la confiance dans le gouvernement. Comme la cour l'a dit dans *Gertz*: «(L)es fausses déclarations de fait n'ont aucune valeur constitutionnelle. Ni le mensonge intentionnel, ni l'erreur négligente ne font avancer véritablement le droit de la société à un débat libre, vigoureux et ouvert sur des questions d'intérêt public» [. . .] Pourtant, dans les affaires du *New York Times*, la plainte du représentant officiel sera rejetée à moins qu'il allègue et convainc le jury que l'auteur savait que les déclarations étaient fausses ou ne se souciait pas qu'elles le soient. En l'absence d'une telle preuve, aucun verdict du jury ni jugement de quelque sorte ne sera prononcé en sa faveur, même si la fausseté de la publication en cause est admise. Le mensonge subsistera et le public continuera d'être mal informé sur des questions d'intérêt public [. . .] En outre, si l'action du demandeur est rejetée, il est probable que le jury prononcera un verdict général et ne conclura pas à la fausseté de la publication même si, en réalité, celle-ci est dénuée de tout fondement. Le public n'aura alors plus qu'à conclure que la déclaration attaquée était véridique, après tout. Sa seule chance d'être bien informé est mesurée en regard de la capacité du représentant officiel de réfuter le mensonge, sans l'aide des tribunaux. Il s'agit là d'un bien faible roseau sur lequel fonder la défense des droits garantis par le Premier amendement . . .

De même, en laissant persister le mensonge, la règle énoncée dans *New York Times* prive clairement le représentant officiel de toute réparation pour le tort causé à sa réputation. Pourtant, la cour a remarqué que le droit de la personne à la protection de son nom est un facteur

constitutional system, reflecting “our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty.” . . .

The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results. [Emphasis added.]

In the subsequent case of *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 476 U.S. 1187 (1986), the majority of the United States Supreme Court refused to grant *certiorari*. Burger C.J. and Rehnquist J. dissented because of their view that the court should re-examine *New York Times v. Sullivan*, *supra*, and “give plenary attention to this important issue” (p. 1187).

(ii) Consideration of the Actual Malice Rule in the United Kingdom

The courts in England have refused to adopt the “actual malice” standard. In *Derbyshire County Council v. Times Newspapers Ltd.*, [1993] 1 All E.R. 1011, the House of Lords considered an action brought by a municipal council against the publisher of a Sunday newspaper. The claim for damages, which was denied, arose from articles concerning the authority’s management of its superannuation fund. In his reasons, Lord Keith stated that public interest considerations similar to those underlying the *New York Times v. Sullivan*, *supra*, decision were involved in that it was “of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism” (p. 1017). However, the appropriateness of the “actual malice” standard was not considered and it was not incorporated into the law of England. In fact, Lord Keith stated that if the individual reputation of any of the local councillors

fondamental dans notre régime constitutionnel, qui reflète «notre concept fondamental de dignité et de valeur essentielles à tout être humain — un concept à la base de tout système acceptable de liberté ordonnée.» . . .

La règle énoncée dans *New York Times* a donc deux résultats néfastes: d’une part, le flot d’information répandu sur les représentants officiels et sur les affaires publiques est contaminé par de faux renseignements qui, fréquemment, subsistent; d’autre part, la réputation et la vie professionnelle du demandeur débouté peuvent être détruites par des mensonges qui auraient pu être évités si un effort raisonnable d’enquêter sur les faits avait été fourni. Du point de vue du Premier amendement et du droit à la réputation en jeu, ces résultats semblent très malencontreux. [Je souligne.]

Dans l’arrêt subséquent *Coughlin c. Westinghouse Broadcasting & Cable, Inc.*, 476 U.S. 1187 (1986), la Cour suprême des États-Unis à la majorité a refusé d’accorder un *certiorari*. Le juge en chef Burger et le juge Rehnquist se sont portés dissidents, étant d’avis que la cour devrait reconsidérer l’arrêt *New York Times c. Sullivan*, précité, et [TRADUCTION] «prêter toute son attention à cette importante question» (p. 1187).

(ii) L’examen de la règle de la malveillance véritable au Royaume-Uni

Les tribunaux d’Angleterre ont refusé d’adopter la norme de la «malveillance véritable». Dans *Derbyshire County Council c. Times Newspapers Ltd.*, [1993] 1 All E.R. 1011, la Chambre des lords était saisie d’une action intentée par un conseil municipal contre l’éditeur d’un journal dominical. L’action en dommages-intérêts, qui a été rejetée, procédait d’articles se rapportant à la gestion par les autorités de leur régime de retraite. Dans ses motifs, lord Keith a déclaré que des considérations d’intérêt public semblables à celles qui avaient fondé l’arrêt *New York Times c. Sullivan*, précité, étaient en jeu en ce qu’il était [TRADUCTION] «de la plus haute importance pour le public qu’un organisme gouvernemental démocratiquement élu, ou en fait tout organisme gouvernemental, puisse être critiqué librement sur la place publique» (p. 1017). Toutefois, l’opportunité de la norme de la «malveillance véritable» n’a pas été examinée, et la règle n’a pas été intégrée dans le droit anglais. En

133

134

had been wrongly damaged by the impugned publication, they could have brought an action for defamation in their personal capacity.

(iii) The Australian Position on Actual Malice

135

The Australian case of *Theophanous v. Herald & Weekly Times Ltd.* (1994), 124 A.L.R. 1 (H.C.), considered an action brought by a member of that country's House of Representatives in response to a letter to the editor of a local newspaper which was critical of his views. Although a plurality of the seven judges sitting on the High Court held that the existing law of defamation curtailed the constitutionally protected right to political discussion, it rejected the adoption of the "actual malice" standard, stating at pp. 22-23:

Even assuming that, in conformity with *Sullivan*, the test is confined to plaintiffs who are public officials, in our view it gives inadequate protection to reputation. . . .

... the protection of free communication does not necessitate such a subordination of the protection of individual reputation as appears to have occurred in the United States.

(iv) The Position Taken by International Law Reform Commissions

136

International law reform organizations have also criticized the *New York Times v. Sullivan* rule. The Australian Law Reform Commission's Report No. 11, *Unfair Publication: Defamation and Privacy* (the Kirby Committee Report) (1979), criticized the concept of "public official" on the basis that "a minor elected official or public servant [would be] in a more vulnerable position than a prominent businessman" (p. 252). The United Kingdom *Report of the Committee on Defamation* (the Faulks Committee Report) (1975), held that the rule "would in many cases deny a just remedy to defamed persons" (p. 169). Finally, the Irish Law Reform Commission's *Report on the Civil Law of Defamation* (the Keane Final Report) (1991), stated that "while the widest possible range of criticism of public officials and public figures is desir-

fait, lord Keith a déclaré que, si la réputation de l'un des conseillers municipaux avait été ternie à tort par la publication contestée, il aurait pu intentionner une action en diffamation en sa qualité personnelle.

(iii) La position australienne à l'égard de la malveillance véritable

Dans l'affaire australienne *Theophanous c. Herald & Weekly Times Ltd.* (1994), 124 A.L.R. 1 (H.C.), une action était intentée par un membre de la Chambre des représentants en réponse à une lettre envoyée au rédacteur d'un journal local qui critiquait ses opinions. Bien qu'une majorité des sept juges de la Haute Cour ait conclu que le droit de la diffamation existant portait atteinte au droit constitutionnellement protégé au débat politique, elle a rejeté l'adoption de la norme de la «malveillance véritable», déclarant aux pp. 22 et 23:

[TRADUCTION] Même à supposer que, conformément à l'arrêt *Sullivan*, le critère soit confiné aux titulaires d'une charge publique, à notre avis il offre une protection inadéquate à la réputation . . .

... la protection de la libre communication ne requiert pas semblable subordination de la protection de la réputation d'une personne, comme il paraît s'être produit aux États-Unis.

(iv) La position des commissions de réforme du droit internationales

Les organisations internationales de réforme du droit ont également critiqué la règle énoncée dans *New York Times c. Sullivan*. Les auteurs du rapport n° 11, *Unfair Publication: Defamation and Privacy* (le Kirby Committee Report) (1979), de la Commission de réforme du droit de l'Australie, ont critiqué le concept de «représentant officiel» pour le motif qu'[TRADUCTION] «un représentant élu de rang moins élevé ou un fonctionnaire [seraient] dans une position plus vulnérable que l'homme d'affaires en vue» (p. 252). Le *Report of the Committee on Defamation* du Royaume-Uni (le Faulks Committee Report) (1975), conclut que la règle [TRADUCTION] «priverait souvent les victimes de la diffamation d'une réparation juste» (p. 169). Enfin, le *Report on the Civil Law of Defamation* (le Keane Final Report) (1991), de la Commission

able, statements of fact contribute meaningfully to public debate only if they are true" (p. 82).

(e) *Conclusion: Should the Law of Defamation be Modified by Incorporating the Sullivan Principle?*

The *New York Times v. Sullivan* decision has been criticized by judges and academic writers in the United States and elsewhere. It has not been followed in the United Kingdom or Australia. I can see no reason for adopting it in Canada in an action between private litigants. The law of defamation is essentially aimed at the prohibition of the publication of injurious false statements. It is the means by which the individual may protect his or her reputation which may well be the most distinguishing feature of his or her character, personality and, perhaps, identity. I simply cannot see that the law of defamation is unduly restrictive or inhibiting. Surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish. The law of defamation provides for the defences of fair comment and of qualified privilege in appropriate cases. Those who publish statements should assume a reasonable level of responsibility.

The Canadian Daily Newspaper Association indicated, in its response to *A Consultation Draft of the General Limitations Act* (September 1991) at p. 3, that the law of libel is a "carefully-crafted regime" which has "functioned fairly for the media and for complainants for many years". Freedom of speech, like any other freedom, is subject to the law and must be balanced against the essential need of the individuals to protect their reputation. The words of Diplock J. in *Silkin v. Beaverbrook Newspapers Ltd.*, [1958] 1 W.L.R. 743, at pp. 745-46, are worth repeating:

de réforme du droit de l'Irlande, a déclaré que [TRADUCTION] «s'il est souhaitable que les représentants officiels et les personnalités publiques fassent l'objet d'une critique qui soit la plus vaste possible, les déclarations de fait ne contribuent de façon significative au débat public que si elles sont véridiques» (p. 82).

e) *Conclusion: Devrait-on modifier le droit de la diffamation en y introduisant le principe énoncé dans Sullivan?*

L'arrêt *New York Times c. Sullivan* a été critiqué par les juges et les auteurs aux États-Unis et ailleurs. Il n'a pas été suivi au Royaume-Uni, ni en Australie, et je ne vois aucune raison de l'adopter au Canada dans une action opposant des plaideurs privés. Le droit de la diffamation vise essentiellement à interdire la publication de propos faux et injurieux. C'est le moyen grâce auquel la personne peut protéger sa réputation, qui pourrait très bien constituer l'attribut le plus déterminant de sa moralité, de sa personnalité et peut-être même de son identité. Je ne pense tout simplement pas que le droit de la diffamation soit indûment restrictif ou inhibitif. De toute évidence, ce n'est pas trop exiger des individus qu'ils vérifient la vérité des allégations qu'ils publient. Le droit de la diffamation permet la défense du commentaire loyal et de l'immunité relative dans les cas appropriés. Ceux qui publient des déclarations devraient assumer un niveau raisonnable de responsabilité.

L'Association canadienne des éditeurs de quotidiens a indiqué, dans sa réponse à un document intitulé *A Consultation Draft of the General Limitations Act* (septembre 1991) à la p. 3, que le droit du libelle est [TRADUCTION] «un régime soigneusement élaboré [qui] a fonctionné équitablement tant pour les médias que pour les plaignants pendant de nombreuses années». La liberté de parole, comme toute autre liberté, est assujettie à la loi et doit être mesurée en regard de la nécessité essentielle pour les individus de protéger leur réputation. Les termes du juge Diplock dans *Silkin c. Beaverbrook Newspapers Ltd.*, [1958] 1 W.L.R. 743, aux pp. 745 et 746, méritent d'être répétés:

137

138

Freedom of speech, like the other fundamental freedoms, is freedom under the law, and over the years the law has maintained a balance between, on the one hand, the right of the individual . . . whether he is in public life or not, to his unsullied reputation if he deserves it, and on the other hand . . . the right of the public . . . to express their views honestly and fearlessly on matters of public interest, even though that involves strong criticism of the conduct of public people.

[TRADUCTION] Comme toute autre liberté fondamentale, la liberté de parole s'exerce en vertu du droit; au fil des ans, le droit a maintenu un équilibre entre, d'une part, le droit de la personne [. . .], qu'elle mène une vie publique ou non, à une réputation intacte, si elle le mérite et, d'autre part, [. . .] le droit du public [. . .] d'exprimer ses opinions honnêtement et sans crainte sur des questions d'intérêt public, même si cela implique une critique sévère du comportement des personnalités publiques.

139 None of the factors which prompted the United States Supreme Court to rewrite the law of defamation in America are present in the case at bar. First, this appeal does not involve the media or political commentary about government policies. Thus the issues considered by the High Court of Australia in *Theophanous*, *supra*, are also not raised in this case and need not be considered.

Aucun des facteurs qui ont amené la Cour suprême des États-Unis à reformuler le droit de la diffamation aux États-Unis ne se présentent en l'espèce. D'une part, le pourvoi ne porte ni sur les médias, ni sur un commentaire politique des décisions du gouvernement. Les questions examinées par la Haute Cour de l'Australie dans *Theophanous*, précité, n'ont donc pas été soulevées en l'espèce, et n'ont pas à être considérées.

140 Second, a review of jury verdicts in Canada reveals that there is no danger of numerous large awards threatening the viability of media organizations. Finally, in Canada there is no broad privilege accorded to the public statements of government officials which needs to be counterbalanced by a similar right for private individuals.

D'autre part, un examen des verdicts de jury au Canada révèle que la viabilité des organisations médiatiques n'est pas menacée par un risque de dommages-intérêts élevés et fréquents. Enfin, au Canada, on n'accorde aux déclarations publiques des représentants du gouvernement aucune immunité générale qui demande à être contrebalancée par un droit de même nature pour les particuliers.

141 In conclusion, in its application to the parties in this action, the common law of defamation complies with the underlying values of the *Charter* and there is no need to amend or alter it.

En conclusion, dans son application aux parties en l'espèce, la common law de la diffamation respecte les valeurs de la *Charte* et il n'est pas besoin de la modifier.

142 Consideration must now be given to the submission made on behalf of Morris Manning that the defence of qualified privilege should be expanded to include reports upon pleadings and court documents that have been filed or are at the point of being filed.

Il y a maintenant lieu de considérer l'argument avancé pour le compte de Morris Manning, selon lequel il y a lieu d'étendre la défense d'immunité relative aux comptes rendus concernant les actes de procédure et les documents judiciaires qui sont déposés ou sur le point de l'être.

(f) *Should the Common Law Defence of Qualified Privilege be Expanded to Comply with Charter Values?*

f) *Faut-il élargir la défense d'immunité relative en common law pour la rendre conforme aux valeurs de la Charte?*

143 Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. As Lord Atkinson explained in *Adam v. Ward*, [1917] A.C. 309 (H.L.), at p. 334:

L'immunité relative se rattache aux circonstances entourant la communication, et non à la communication elle-même. Comme l'explique lord Atkinson dans *Adam c. Ward*, [1917] A.C. 309 (C.L.), à la p. 334:

... a privileged occasion is ... an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

This passage was quoted with approval in *McLoughlin v. Kutasy*, [1979] 2 S.C.R. 311, at p. 321.

The legal effect of the defence of qualified privilege is to rebut the inference, which normally arises from the publication of defamatory words, that they were spoken with malice. Where the occasion is shown to be privileged, the *bona fides* of the defendant is presumed and the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff. However, the privilege is not absolute and can be defeated if the dominant motive for publishing the statement is actual or express malice. See *Horrocks v. Lowe*, [1975] A.C. 135 (H.L.), at p. 149.

Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes, as Dickson J. (as he then was) pointed out in dissent in *Cherneskey*, *supra*, at p. 1099, "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created. See, also, *Taylor v. Despard*, [1956] O.R. 963 (C.A.). Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth. See *McLoughlin*, *supra*, at pp. 323-24, and *Netupsky v. Craig*, [1973] S.C.R. 55, at pp. 61-62.

Qualified privilege may also be defeated when the limits of the duty or interest have been exceeded. See *The Law of Defamation in Canada*, *supra*, at pp. 13-193 and 13-194; *Salmond and Heuston on the Law of Torts* (20th ed. 1992), at pp. 166-67. As Loreburn E. stated at pp. 320-21 in *Adam v. Ward*, *supra*:

[TRANSLATION] ... il y a une immunité relative [...] dans des circonstances où la personne qui donne des renseignements a un intérêt ou une obligation légale, sociale ou morale, de les donner à la personne à qui elle les fournit et la personne qui les reçoit a un intérêt ou une obligation correspondant de les recevoir. La réciprocité est essentielle.

Ce passage a été cité et approuvé dans l'arrêt *McLoughlin c. Kutasy*, [1979] 2 R.C.S. 311, à la p. 321.

La défense d'immunité relative a pour effet en droit de réfuter l'inférence, qui normalement découle de la publication de propos diffamatoires, que ceux-ci étaient motivés par la malveillance. Lorsque l'on établit qu'il y a une immunité, la bonne foi du défendeur est présumée et ce dernier est alors libre de publier en toute impunité des remarques sur le demandeur, qui peuvent être diffamatoires et inexacts. Toutefois, l'immunité n'est pas absolue et peut être levée si la publication est principalement motivée par la malveillance véritable ou expresse. Voir *Horrocks c. Lowe*, [1975] A.C. 135 (C.L.), à la p. 149.

Ordinairement, la malveillance s'entend dans le sens populaire de la rancune ou de l'animosité. Toutefois, elle comprend également, comme le juge Dickson (plus tard Juge en chef) l'a souligné en dissidence dans *Cherneskey*, précité, à la p. 1099, «tout motif indirect ou caché» qui entre en conflit avec le sens du devoir ou l'intérêt mutuel que l'occasion a créé. Voir également *Taylor c. Despard*, [1956] O.R. 963 (C.A.). On établira également l'existence de la malveillance en démontrant que le défendeur a parlé avec malhonnêteté, ou au mépris délibéré ou indifférent de la vérité. Voir *McLoughlin*, précité, aux pp. 323 et 324, et *Netupsky c. Craig*, [1973] R.C.S. 55, aux pp. 61 et 62.

L'immunité relative peut également cesser d'exister lorsqu'on a passé outre aux limites du devoir ou de l'intérêt. Voir *The Law of Defamation in Canada*, *op. cit.*, aux pp. 13-193 et 13-194; *Salmond and Heuston on the Law of Torts* (20^e éd. 1992), aux pp. 166 et 167. Comme l'a dit le comte Loreburn aux pp. 320 et 321 dans *Adam c. Ward*, précité:

144

145

146

... the fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that is not relevant and pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege will not be protected.

[TRADUCTION] ... l'immunité résultant d'une situation ne couvre pas nécessairement tout ce qui est dit ou écrit à cette occasion. Ce qui n'a rien à voir avec l'exécution du devoir, avec l'exercice du droit ou avec la sauvegarde de l'intérêt qui crée l'immunité ne sera pas protégé.

147

In other words, the information communicated must be reasonably appropriate in the context of the circumstances existing on the occasion when that information was given. For example, in *Douglas v. Tucker*, [1952] 1 S.C.R. 275, the defendant, during an election campaign, stated that the plaintiff, who was the officer of an investment company, had charged a farmer and his wife an exorbitant rate of interest causing them to lose their property. The plaintiff maintained that the allegation was without foundation. In response, the defendant asserted that the plaintiff was facing a charge of fraud which had been adjourned until after the election. This Court held that the defendant had an interest in responding to the plaintiff's denial, thereby giving rise to an occasion of qualified privilege. However, it ruled that the occasion was exceeded because the defendant's comments went beyond what was "germane and reasonably appropriate" (p. 286).

En d'autres mots, l'information communiquée doit être raisonnablement appropriée dans les circonstances qui prévalaient lorsque l'information a été transmise. Par exemple, dans l'affaire *Douglas c. Tucker*, [1952] 1 R.C.S. 275, le défendeur a dit, au cours d'une campagne électorale, que le demandeur, dirigeant d'une société d'investissement, avait exigé d'un fermier et de son épouse un taux d'intérêt exorbitant qui leur avait fait perdre leur propriété. Le demandeur a soutenu que l'allégation n'était pas fondée. Le défendeur a répondu que le demandeur faisait face à une accusation de fraude qui avait été ajournée après l'élection. Notre Cour a conclu que le défendeur avait un intérêt à répondre à la dénégation du demandeur, ce qui donnait naissance à une situation d'immunité relative. Elle a cependant statué que le défendeur avait abusé de la situation parce que ses commentaires allaient au-delà de ce qui était [TRADUCTION] «pertinent et raisonnablement approprié» (p. 286).

148

In *Sun Life Assurance Co. of Canada v. Dalrymple*, [1965] S.C.R. 302, the district manager of the defendant insurance company threatened to resign and take the district agents with him. This Court held that it fell within the scope of the privilege for the company to make certain defamatory comments about the plaintiff in order to dissuade its agents from leaving.

Dans *Sun Life Assurance Co. of Canada c. Dalrymple*, [1965] R.C.S. 302, le directeur de district de la compagnie d'assurances défenderesse a menacé de démissionner et d'emmener les agents de district avec lui. Notre Cour a conclu que certains commentaires diffamatoires faits par la compagnie au sujet du demandeur, pour dissuader ses agents de partir, étaient couverts par l'immunité.

149

The principal question to be answered in this appeal is whether the recitation of the contents of the notice of motion by Morris Manning took place on an occasion of qualified privilege. If so, it remains to be determined whether or not that privilege was exceeded and thereby defeated.

La question principale à laquelle il faut répondre dans le présent pourvoi est de savoir si la lecture du contenu de l'avis de requête par Morris Manning jouissait de l'immunité relative. Dans l'affirmative, il reste à déterminer si on a abusé de l'immunité et si elle a donc cessé d'être.

150

The traditional common law rule with respect to reports on documents relating to judicial proceedings is set out in *Gatley on Libel and Slander* (8th ed. 1981), at p. 252, in these words:

La règle de common law traditionnelle relative à la description de documents liés à une procédure judiciaire est énoncée dans les termes suivants dans *Gatley on Libel and Slander* (8^e éd. 1981), à la p. 252:

The rule of law is that, where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open court, then the publication without malice of a fair and accurate report of what takes place before that tribunal is privileged.

See, also, *The Law of Defamation in Canada*, *supra*, at pp. 14-35, 14-42; *Carter-Ruck on Libel and Slander*, *supra*, at pp. 140-41.

The rationale behind this rule is that the public has a right to be informed about all aspects of proceedings to which it has the right of access. This is why a news report referring to the contents of any document filed as an exhibit, or admitted as evidence during the course of the proceedings, is privileged. However, the common law immunity was not extended to a report on pleadings or other documents which had not been filed with the court or referred to in open court. Duff C.J. explained the reasoning for this in *Gazette Printing Co. v. Shallow* (1909), 41 S.C.R. 339, at p. 360:

The publicity of proceedings involving the conduct of a judicial authority serves the important purposes of impressing those concerned in the administration of justice with a sense of public responsibility, and of affording every member of the community an opportunity of observing for himself the mode in which the business of the public tribunals is carried on; but no such object would appear to be generally served by applying the privilege to the publication of preliminary statements of claims and defence relating only to private transactions; formulated by the parties themselves; in respect of which no judicial action has been taken, and upon which judicial action may never be invoked. It is only when such preliminary statements or the claims or defences embodied in them form the basis or the subject of some hearing before, or some action by, a court or a judicial officer, that their contents can become the object of any real public concern as touching the public administration of justice.

In *Edmonton Journal*, *supra*, at pp. 1338-40, I noted that the public scrutiny of our courts by the press was fundamentally important in our democratic society and that s. 2(b) protected not only speakers, but listeners as well. This right to report on court proceedings extended to pleadings and

[TRADUCTION] Suivant la règle de droit, lorsque des procédures judiciaires sont instituées devant un tribunal légitimement constitué, qui exerce sa compétence en séance publique, la publication sans malveillance d'un compte rendu juste et exact de ce qui se passe devant ce tribunal jouit de l'immunité.

Voir également *The Law of Defamation in Canada*, *op. cit.*, aux pp. 14-35, 14-42; *Carter-Ruck on Libel and Slander*, *op. cit.*, aux pp. 140 et 141.

Cette règle repose sur le droit du public d'être informé de tous les aspects d'une instance à laquelle il a droit d'accès. C'est la raison pour laquelle tout reportage concernant le contenu d'un document versé au dossier ou admis en preuve dans le cadre de la procédure est protégé. L'immunité de common law n'a cependant pas été étendue aux comptes rendus concernant des actes de procédure ou autres documents qui n'ont pas été déposés auprès du tribunal, ni mentionnés en audience publique. Le juge en chef Duff a expliqué la raison de cette règle dans *Gazette Printing Co. c. Shallow* (1909), 41 R.C.S. 339, à la p. 360:

[TRADUCTION] La publicité de procédures mettant en cause la conduite d'une autorité judiciaire sert deux objectifs importants: donner à ceux qui travaillent à l'administration de la justice un sens de responsabilité envers le public et offrir à chaque membre de la collectivité l'occasion d'observer par lui-même le fonctionnement des tribunaux publics; toutefois, de façon générale, on ne paraît pas servir ces objectifs en revêtant de l'immunité la publication des exposés préliminaires des réclamations et des défenses visant un litige privé, formulés par les parties elles-mêmes, relativement auxquels aucune action judiciaire n'a été instituée, et sur le fondement desquels aucune action judiciaire ne sera peut-être jamais invoquée. Ce n'est que lorsque les exposés préliminaires des réclamations ou les défenses qui y sont énoncées sont le fondement ou l'objet d'une audience devant un tribunal ou un officier de justice, ou d'une action de leur part, que leur contenu peut réellement concerner le public en ce qu'ils touche à l'administration publique de la justice.

Dans l'arrêt *Edmonton Journal*, précité, aux pp. 1338 à 1340, j'ai souligné que l'examen public de nos tribunaux par la presse était fondamentalement important dans notre société démocratique et que l'al. 2b) protégeait autant celui qui s'exprime que celui qui l'écoute. Ce droit de rendre compte des

court documents filed before trial, since access to these documents served the same societal needs as reporting on trials. Even in private actions, such as those for wrongful dismissal or for personal damages, the public may well have an interest in knowing the kinds of submissions which can be put forward.

procédures judiciaires s'étendait aux actes de procédure et documents judiciaires déposés avant le procès puisque l'accès à ces documents servait, dans la société, la même exigence que les reportages sur les procès. Même dans les actions privées, comme les actions pour congédiement injustifié ou dommages-intérêts personnels, le public peut avoir quelque intérêt à connaître la nature des prétentions qui peuvent être avancées.

153

Both societal standards and the legislation have changed with regard to access to court documents. When the qualified privilege rule was set out in *Shallow*, *supra*, court documents were not open to the public. Today, the right of access is guaranteed by legislative provision, in this case s. 137(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. As well, s. 2(b) of the *Charter* may in some circumstances provide a basis for gaining access to some court documents. However, just as s. 137(1) provides for limitations on the right of access to court documents, so too is the s. 2(b) guarantee subject to reasonable limits that can be demonstrably justified in a free and democratic society. This Court's reasons in *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122, provide an illustration of the kind of restriction that has been upheld in relation to information flowing from court proceedings. In that case, the constitutionality of s. 442(3) of the *Criminal Code* was upheld. It imposed a publication ban on the identity of a complainant in sexual assault cases (or any information that might disclose her identity) upon the request of that complainant. There is no need to elaborate further on the scope of access, however, since it does not arise on the facts of this case. It is sufficient to observe that, in appropriate circumstances, s. 2(b) may provide the means to gain access to court documents. It follows that the concept of qualified privilege should be modified accordingly.

Les normes de la société et la loi ont changé dans le domaine de l'accès aux documents judiciaires. Lorsque la règle de l'immunité relative a été énoncée dans *Shallow*, précité, le public n'avait pas accès à ces documents. Aujourd'hui, le droit d'accès est garanti par une disposition législative, en l'espèce le par. 137(1) de la *Loi sur les tribunaux judiciaires*, L.R.O. 1990, ch. C.43. De même, on peut se fonder sur l'al. 2b) de la *Charte*, dans certaines circonstances, pour obtenir accès à certains documents judiciaires. Cependant, tout comme le par. 137(1) prévoit des limites au droit d'accès à des documents judiciaires, la garantie offerte par l'al. 2b) est assujettie à des limites raisonnables dont la justification peut se démontrer dans une société libre et démocratique. Les motifs, dans l'arrêt de notre Cour *Canadian Newspapers Co. c. Canada (Procureur général)*, [1988] 2 R.C.S. 122, donnent un exemple du genre de restriction qui a été confirmée relativement à l'information découlant de procédures judiciaires. Cet arrêt a confirmé la constitutionnalité du par. 442(3) du *Code criminel* qui imposait une interdiction de publication de l'identité de la plaignante dans les affaires d'agression sexuelle (ou de tout renseignement qui pourrait dévoiler son identité) sur demande de cette plaignante. Il n'est cependant pas nécessaire de s'étendre davantage sur la portée de l'accès, puisque les faits de l'espèce ne soulèvent pas cette question. Il suffit de faire observer que, dans des circonstances appropriées, l'al. 2b) peut fournir le moyen d'obtenir l'accès à des documents judiciaires. Il faut donc modifier le concept de l'immunité relative en conséquence.

154

The public interest in documents filed with the court is too important to be defeated by the kind of technicality which arose in this case. The record

L'intérêt du public dans les documents déposés en justice est trop important pour y opposer la considération de procédure soulevée en l'espèce. Le

demonstrates that, prior to holding the press conference, Morris Manning had every intention of initiating the contempt action in accordance with the prevailing rules, and had given instructions to this effect. In fact, the proper documents were served and filed the very next morning. The fact that, by some misadventure, the strict procedural requirement of filing the documents had not been fulfilled at the time of the press conference should not defeat the qualified privilege which attached to this occasion.

This said, it is my conclusion that Morris Manning's conduct far exceeded the legitimate purposes of the occasion. The circumstances of this case called for great restraint in the communication of information concerning the proceedings launched against Casey Hill. As an experienced lawyer, Manning ought to have taken steps to confirm the allegations that were being made. This is particularly true since he should have been aware of the Scientology investigation pertaining to access to the sealed documents. In those circumstances he was duty bound to wait until the investigation was completed before launching such a serious attack on Hill's professional integrity. Manning failed to take either of these reasonable steps. As a result of this failure, the permissible scope of his comments was limited and the qualified privilege which attached to his remarks was defeated.

The press conference was held on the steps of Osgoode Hall in the presence of representatives from several media organizations. This constituted the widest possible dissemination of grievous allegations of professional misconduct that were yet to be tested in a court of law. His comments were made in language that portrayed Hill in the worst possible light. This was neither necessary nor appropriate in the existing circumstances. While it is not necessary to characterize Manning's conduct as amounting to actual malice, it was certainly high-handed and careless. It exceeded any legitimate purpose the press conference may have served. His conduct, therefore, defeated the qualified privilege that attached to the occasion.

dossier révèle qu'avant de tenir la conférence de presse, Morris Manning avait la ferme intention d'introduire l'action pour outrage conformément aux règles qui existaient alors, et qu'il avait donné des instructions dans ce sens. En fait, les documents appropriés ont été signifiés et déposés dès le lendemain matin. Le fait que, par mégarde, l'exigence procédurale de déposer les documents n'ait pas été strictement respectée au moment de la conférence de presse ne devrait pas écarter l'immunité relative qui s'appliquait à cette situation.

Ceci étant dit, je conclus que le comportement de Morris Manning a dépassé de beaucoup les objectifs légitimes de la situation. Les circonstances de l'affaire exigeaient une grande retenue dans la communication de l'information concernant les procédures lancées contre Casey Hill. Manning, en avocat expérimenté, aurait dû prendre des mesures pour confirmer les allégations qu'il allait faire. Ceci est d'autant plus vrai qu'il devait savoir que Scientology menait une enquête relativement à l'accès aux documents scellés. Dans ces circonstances, il avait le devoir d'attendre que cette investigation soit close avant de lancer contre l'intégrité professionnelle de Hill une attaque aussi grave. Manning n'a pris ni l'une ni l'autre de ces mesures raisonnables. Par suite de cette omission, la portée admissible de ses commentaires était limitée et l'immunité relative qui s'appliquait à ses remarques a cessé d'être.

La conférence de presse s'est déroulée sur les marches d'Osgoode Hall en présence de représentants de plusieurs médias. Cela constituait la publication la plus vaste possible d'allégations graves d'inconduite professionnelle non encore vérifiées devant une cour de justice. Ses commentaires décrivaient Hill sous l'éclairage le plus sombre. Cela était inutile et inconvenant dans les circonstances. Il n'est pas nécessaire de qualifier la conduite de Manning de véritable malveillance, mais elle était certainement abusive et imprudente et allait au-delà de tout objectif légitime que pouvait servir la conférence de presse. Sa conduite a donc éliminé l'immunité relative qui s'appliquait à la situation.

(B) *Damages*(1) The Standard of Appellate Review

The appellants do not contend that the trial judge made any substantive error in his careful directions to the jury. Thus, there is no question of misdirection of the jury or of its acting upon an improper basis or of any jury consideration given to wrongfully admitted or excluded evidence. The sole issue is whether the quantum of the jury's award can stand.

Jurors are drawn from the community and speak for their community. When properly instructed, they are uniquely qualified to assess the damages suffered by the plaintiff, who is also a member of their community. This is why, as Robins J.A. noted in *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104 (C.A.), at p. 110, it is often said that the assessment of damages is "peculiarly the province of the jury". Therefore, an appellate court is not entitled to substitute its own judgment as to the proper award for that of the jury merely because it would have arrived at a different figure.

The basis upon which an appellate court can act was very clearly enunciated by Robins J.A. in *Walker, supra*. He stated at p. 110 that the court should consider:

... whether the verdict is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate or, put another way, whether the verdict is so exorbitant or so grossly out of proportion to the libel as to shock the court's conscience and sense of justice.

The history of this action emphasizes the reasonableness of the jury's verdict. It was the appellants who had always insisted upon the jury assessing damages for the libel. When the jury had retired to consider their verdict, they returned after four hours with the sagacious question: "what if any are realistic maximums that have been assessed by society in recent history?". The trial judge prudently sought the advice of counsel on

(B) *Les dommages-intérêts*(1) La norme de contrôle en appel

Les appelants ne font pas valoir que le juge du procès a commis une erreur fondamentale dans les directives soignées qu'il a données au jury. Aussi, n'est-il pas question de directives erronées, ni d'un jury agissant sur un fondement incorrect, ni d'une considération accordée par le jury à des éléments de preuve admis ou écartés erronément. La seule question est de savoir si le montant accordé par le jury peut être maintenu.

Les jurés sont issus de la communauté et s'expriment au nom de celle-ci. Pourvus de directives appropriées, ils sont les seuls qualifiés pour évaluer le tort causé au demandeur, lui aussi membre de la communauté. C'est la raison pour laquelle, comme le juge Robins l'a signalé dans *Walker c. CFTO Ltd.* (1987), 59 O.R. (2d) 104 (C.A.), à la p. 110, on dit fréquemment que l'évaluation des dommages relève [TRADUCTION] «particulièrement de la compétence du jury». Par conséquent, le tribunal d'appel ne peut substituer sa propre opinion à celle du jury quant au montant approprié uniquement parce qu'il en serait arrivé à un montant différent.

Le fondement sur lequel le tribunal d'appel peut intervenir a été très clairement énoncé par le juge Robins dans l'arrêt *Walker*, précité, à la p. 110, où il dit que le tribunal doit se demander:

[TRADUCTION] ... si le verdict est si extraordinairement élevé qu'il excède de toute évidence la limite maximale d'une échelle raisonnable à l'intérieur de laquelle le jury peut légitimement agir, ou en d'autres termes, si le verdict est si exorbitant ou si manifestement exagéré par rapport au libelle qu'il choque la conscience de la cour et le sentiment de justice.

L'historique de l'action fait ressortir le caractère raisonnable du verdict du jury. Ce sont les appelants qui ont toujours insisté pour que le jury évalue les dommages-intérêts pour le libelle. Le jury s'est retiré pour délibérer, puis est revenu après quatre heures pour poser une question judicieuse: [TRADUCTION] «quels sont, le cas échéant, les montants réalistes les plus élevés qui ont été accordés par la société dans l'histoire récente?». Le juge du

the question. Counsel for the appellants agreed with the trial judge that no guidance could be given to the jury as to the quantum of damages. The jury was so advised. They deliberated for another five hours and returned the verdict which is the subject matter of this appeal.

There can be no doubt that the decision of the trial judge on this issue, which was concurred in by counsel for the appellants, was correct. In Ontario, there is no statutory provision for giving guidelines to a jury on this issue. It is significant that in 1989, when the *Courts of Justice Act* was amended (S.O. 1989, c. 67, s. 4) to permit trial judges and counsel to give guidance to juries concerning damage awards in personal injury actions, no provision was made in the Act pertaining to libel actions or any other type of tort action. It would appear, then, that the legislators specifically left the assessment of damages in libel actions to the jury.

The appellants relied upon the case of *Rantzen v. Mirror Group Newspapers (1986) Ltd.*, [1993] 4 All E.R. 975 (C.A.), to support their position that an appellate court should reduce this award. In that case, however, the English Court of Appeal was acting pursuant to newly enacted legislation. This legislation, passed in 1990, specifically provided that, in cases where the court had the authority to order a new trial on the ground that the damages awarded by a jury were excessive or inadequate, it could, instead of ordering a new trial, substitute a sum for damages which it considered to be proper. This statutory provision led the court in *Rantzen* to modify its approach to the review of a jury's assessment of damages. Therefore, this case is of little use.

If guidelines are to be provided to juries, then clearly this is a matter for legislation. In its absence, the standard which must be applied remains that the jury's assessment should not be

procès a sagement demandé l'avis des avocats sur la question. L'avocat des appelants a convenu avec le juge du procès qu'aucune directive ne pouvait être donnée au jury quant au montant des dommages-intérêts. Le jury en a été avisé. Il a délibéré pendant encore cinq heures, puis a prononcé le verdict qui fait l'objet du présent pourvoi.

Il est certain que la décision du juge du procès sur cette question, à laquelle a souscrit l'avocat des appelants, était correcte. En Ontario, aucune disposition législative ne prévoit que le jury doit recevoir des directives sur la question. Il est intéressant de noter qu'en 1989, lorsque la *Loi sur les tribunaux judiciaires* a été modifiée (L.O. 1989, ch. 67, art. 4) pour permettre aux juges de première instance et aux avocats de conseiller le jury relativement au montant des dommages-intérêts dans les actions pour blessures corporelles, on n'a prévu dans la Loi aucune disposition se rapportant aux actions en libelle ou à toute autre forme d'action en responsabilité délictuelle. Il semble donc que le législateur ait expressément laissé au jury la tâche d'évaluer les dommages-intérêts dans les actions en libelle.

Les appelants ont invoqué l'arrêt *Rantzen c. Mirror Group Newspapers (1986) Ltd.*, [1993] 4 All E.R. 975 (C.A.), pour soutenir qu'un tribunal d'appel devrait réduire ce montant. Dans cette affaire, toutefois, la cour d'appel de l'Angleterre agissait conformément à une loi adoptée peu de temps auparavant. Adoptée en 1990, cette loi prévoit expressément que, lorsque la cour a le pouvoir d'ordonner la tenue d'un nouveau procès pour le motif que les dommages-intérêts accordés par le jury sont excessifs ou insuffisants, elle peut, au lieu d'ordonner un nouveau procès, substituer à la somme fixée par le jury les dommages-intérêts qu'elle estime justes. Cette disposition a incité la cour dans l'arrêt *Rantzen* à modifier sa position quant au contrôle de l'évaluation des dommages-intérêts par le jury. Par conséquent, cette affaire n'est guère utile.

Si des directives doivent être données au jury, c'est manifestement à la législation de le faire. À défaut, la règle demeure: l'évaluation par le jury ne sera modifiée que si elle choque la conscience de

161

162

163

varied unless it shocks the conscience of the court. With this in mind, let us first consider the jury's assessment of damages.

(2) General Damages

164

It has long been held that general damages in defamation cases are presumed from the very publication of the false statement and are awarded at large. See *Ley v. Hamilton* (1935), 153 L.T. 384 (H.L.), at p. 386. They are, as stated, peculiarly within the province of the jury. These are sound principles that should be followed.

165

The consequences which flow from the publication of an injurious false statement are invidious. The television report of the news conference on the steps of Osgoode Hall must have had a lasting and significant effect on all who saw it. They witnessed a prominent lawyer accusing another lawyer of criminal contempt in a setting synonymous with legal affairs and the courts of the province. It will be extremely difficult to correct the impression left with viewers that Casey Hill must have been guilty of unethical and illegal conduct.

166

The written words emanating from the news conference must have had an equally devastating impact. All who read the news reports would be left with a lasting impression that Casey Hill has been guilty of misconduct. It would be hard to imagine a more difficult situation for the defamed person to overcome. Every time that person goes to the convenience store, or shopping centre, he will imagine that the people around him still retain the erroneous impression that the false statement is correct. A defamatory statement can seep into the crevasses of the subconscious and lurk there ever ready to spring forth and spread its cancerous evil. The unfortunate impression left by a libel may last a lifetime. Seldom does the defamed person have the opportunity of replying and correcting the record in a manner that will truly remedy the situation. It is members of the community in which the defamed person lives who will be best able to assess the damages. The jury as representative of that community should be free to make an assessment of damages which will provide the plaintiff

la cour. Tout en gardant cet élément à l'esprit, voyons d'abord l'évaluation des dommages-intérêts par le jury.

(2) Les dommages-intérêts généraux

Il est établi depuis longtemps que, dans les affaires de diffamation, la publication même d'une fausse déclaration crée la présomption qu'il y a lieu normalement à dommages-intérêts généraux. Voir *Ley c. Hamilton* (1935), 153 L.T. 384 (C.L.), à la p. 386. Cela relève particulièrement, je le répète, de la compétence du jury. Il s'agit là de principes sages que l'on doit respecter.

Les conséquences de la publication de déclarations fausses et injurieuses sont pernicieuses. Le reportage télévisé de la conférence de presse devant Osgoode Hall a dû marquer les téléspectateurs de façon durable et significative. Ils ont pu voir un avocat en vue d'accuser un confrère d'outrage au criminel, dans un cadre qui évoque le droit et la justice. Il sera extrêmement difficile de corriger l'impression laissée chez les téléspectateurs que Casey Hill devait être coupable de conduite déloyale et illégale.

Les écrits émanant de la conférence de presse ont dû avoir un impact aussi dévastateur. Tous les lecteurs des articles seraient alors marqués par l'impression persistante que Casey Hill avait agi incorrectement. Il serait difficile d'imaginer une situation plus difficile à surmonter pour la victime de diffamation. Chaque fois qu'elle se rend à un magasin, elle s' imagine que les gens autour d'elle ont gardé la fausse impression que les propos mensongers étaient exacts. Une déclaration diffamatoire peut s'infiltrer dans les crevasses du subconscient et y demeurer, toujours prête à surgir et à répandre son mal cancéreux. L'impression malencontreuse laissée par un libelle peut subsister indéfiniment. Il est rare que la victime de diffamation puisse répondre et dissiper le doute d'une manière qui remédie véritablement à la situation. Ce sont les membres de la communauté dans laquelle vit la victime qui sont les mieux à même d'évaluer le préjudice. Le jury, en tant que représentant de cette communauté, doit être libre d'effectuer une évaluation des dommages-intérêts que le demandeur est

with a sum of money that clearly demonstrates to the community the vindication of the plaintiff's reputation.

(a) *Should a Cap be Imposed on Damages in Defamation Cases?*

The appellants contend that there should be a cap placed on general damages in defamation cases just as was done in the personal injury context. In the so-called "trilogy" of *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, *Arnold v. Teno*, [1978] 2 S.C.R. 287, and *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267, it was held that a plaintiff claiming non-pecuniary damages for personal injuries should not recover more than \$100,000.

In my view, there should not be a cap placed on damages for defamation. First, the injury suffered by a plaintiff as a result of injurious false statements is entirely different from the non-pecuniary damages suffered by a plaintiff in a personal injury case. In the latter case, the plaintiff is compensated for every aspect of the injury suffered: past loss of income and estimated future loss of income, past medical care and estimated cost of future medical care, as well as non-pecuniary damages. Second, at the time the cap was placed on non-pecuniary damages, their assessment had become a very real problem for the courts and for society as a whole. The damages awarded were varying tremendously not only between the provinces but also between different districts of a province. Perhaps as a result of motor vehicle accidents, the problem arose in the courts every day of every week. The size and disparity of assessments was affecting insurance rates and, thus, the cost of operating motor vehicles and, indeed, businesses of all kinds throughout the land. In those circumstances, for that one aspect of recovery, it was appropriate to set a cap.

fondé à recevoir et qui démontrent clairement à la communauté que sa réputation a été restaurée.

a) *Faut-il fixer un plafond aux dommages-intérêts dans les affaires de diffamation?*

Les appelants soutiennent que l'on devrait imposer un plafond aux dommages-intérêts généraux accordés dans les affaires de diffamation, tout comme on l'a fait dans le contexte des blessures corporelles. Ce que l'on appelle la «trilogie» de *Andrews c. Grand & Toy Alberta Ltd.*, [1978] 2 R.C.S. 229, *Arnold c. Teno*, [1978] 2 R.C.S. 287, et *Thornton c. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 R.C.S. 267, a établi que le demandeur de dommages-intérêts non pécuniaires pour blessures corporelles ne devrait pouvoir obtenir plus de 100 000 \$.

À mon avis, on ne devrait imposer aucun maximum aux dommages-intérêts accordés en matière de diffamation. Premièrement, le tort subi par un demandeur du fait de déclarations fausses et injurieuses est complètement différent des dommages non pécuniaires subis par le demandeur dans une affaire de blessures corporelles. Dans ce dernier cas, le demandeur reçoit une compensation pour chaque aspect de la blessure subie: la perte de revenu passée et future, le coût des soins médicaux passés et futurs, de même que des dommages-intérêts non pécuniaires. Deuxièmement, à l'époque où le plafond a été fixé à l'égard des dommages-intérêts non pécuniaires, leur évaluation était devenu un problème aigu pour les tribunaux et la société en général. Les dommages-intérêts accordés variaient considérablement non seulement d'une province à l'autre, mais également d'un district à l'autre d'une même province. Peut-être était-ce en raison des accidents automobiles, mais le problème se présentait quotidiennement devant les tribunaux. L'ampleur et la disparité des évaluations avaient un impact sur les primes d'assurance et, par le fait même, sur le coût d'opération des véhicules à moteur et, en fait, sur des entreprises de toutes sortes partout au pays. Dans ces circonstances, pour ce seul aspect du recouvrement, il convenait de fixer un plafond.

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A very different situation is presented with respect to libel actions. In these cases, special damages for pecuniary loss are rarely claimed and often exceedingly difficult to prove. Rather, the whole basis for recovery for loss of reputation usually lies in the general damages award. Further, a review of the damage awards over the past nine years reveals no pressing social concern similar to that which confronted the courts at the time the trilogy was decided. From 1987 to 1991, there were only 27 reported libel judgments in Canada, with an average award of \$30,000. Subsequent to the decision in this case, from 1992 to 1995, there have been 24 reported libel judgments, with an average award of less than \$20,000. This later figure does not include the award in *Jill Fishing Ltd. v. Koranda Management Inc.*, [1993] B.C.J. No. 1861 (S.C.), which involved the assessment of damages for a number of different causes of action. Therefore, there is no indication that a cap is required in libel cases.

170

There is a great difference in the nature of the tort of defamation and that of negligence. Defamation is the intentional publication of an injurious false statement. While it is true that an actual intention to defame is not necessary to impose liability on a defendant, the intention to do so is nevertheless inferred from the publication of the defamatory statement. This gives rise to the presumption of malice which may be displaced by the existence of a qualified privilege. Personal injury, on the other hand, results from negligence which does not usually arise from any desire to injure the plaintiff. Thus, if it were known in advance what amount the defamer would be required to pay in damages (as in the personal injury context), a defendant might look upon that sum as the maximum cost of a licence to defame. A cap would operate in a manner that would change the whole character and function of the law of defamation. It would amount to a radical change in policy and direction for the courts.

Les actions en libelle présentent une situation très différente. Dans ces affaires, on réclame rarement des dommages-intérêts spéciaux pour perte pécuniaire, lesquels sont souvent extrêmement difficiles à établir. Normalement, le seul fondement de la réparation pour atteinte à la réputation se trouve dans les dommages-intérêts généraux. En outre, un examen des dommages-intérêts accordés au cours des neuf dernières années ne révèle aucune préoccupation sociale urgente semblable à celle avec laquelle les tribunaux étaient aux prises à l'époque de la trilogie. De 1987 à 1991, on n'a rapporté que 27 décisions en matière de libelle au Canada, la moyenne des montants accordés se situant à 30 000 \$. Après la décision en l'espèce, de 1992 à 1995, on a rapporté 24 décisions en matière de libelle, la moyenne des montants accordés s'élevant à 20 000 \$. Ce dernier chiffre n'inclut pas le montant accordé dans *Jill Fishing Ltd. c. Koranda Management Inc.*, [1993] B.C.J. No. 1861 (C.S.), qui mettait en cause une évaluation des dommages-intérêts dans différentes causes d'action. Par conséquent, rien n'indique qu'un maximum soit requis dans les affaires de libelle.

Il existe une énorme différence dans la nature du préjudice causé par la diffamation et celui causé par la négligence. La diffamation est la publication intentionnelle d'une déclaration fausse et injurieuse. S'il est vrai que l'intention véritable de diffamer n'est pas nécessaire pour déclarer le défendeur responsable, la publication de la déclaration diffamatoire permet néanmoins de déduire l'existence de cette intention. Cela donne naissance à la présomption de malveillance que peut écarter l'existence d'une immunité relative. En revanche, les blessures corporelles résultent d'une négligence qui ne provient ordinairement pas du désir de blesser le demandeur. Par conséquent, si l'auteur de la diffamation connaissait à l'avance le montant des dommages-intérêts qu'il sera tenu de payer (comme dans le contexte des blessures corporelles), il pourrait considérer cette somme comme le prix maximal à payer pour être autorisé à diffamer. Un plafond aurait pour effet de modifier la nature et la fonction entières du droit de la diffamation. Il entraînerait un changement radical dans la politique et la direction des tribunaux.

The courts in England have unequivocally rejected the comparison of libel and personal injury cases. See, for example, *Cassell & Co. v. Broome*, [1972] 1 All E.R. 801 (H.L.), at p. 824; *Blackshaw v. Lord*, [1983] 2 All E.R. 311 (C.A.), at pp. 337, 340; *Sutcliffe v. Pressdram Ltd.*, [1990] 1 All E.R. 269 (C.A.), at pp. 281-82, 289; and *Rantzen v. Mirror Group Newspapers (1986) Ltd.*, *supra*.

It is true that in Australia a majority of the High Court held in *Carson v. John Fairfax & Sons Ltd.* (1993), 113 A.L.R. 577, that some useful reference could be made to personal injury cases in assessing general damages. However, the 4-3 division in the court shows the serious concern which this issue engendered. McHugh J., a member of the minority, wrote (at p. 629):

Awards in personal injury cases and defamation actions serve different purposes, have different elements and different histories. They are not comparable. I think that it is a mistake to believe that the pain and suffering component of a personal injury award can be isolated from the other components of that award and then compared to an award of compensatory damages in a defamation action.

In any event, I would observe that, if the trilogy were to be applied, the value of the cap in 1991 would be approximately \$250,000. It follows that even if the appellants' contention on this issue was accepted, the general damages of \$300,000 assessed by the jury would come very close to the range said to be reasonable by the appellants.

(b) *Joint Liability for General Damages*

Manning complains that the judge erred in refusing to accept his request that the verdict in general damages be rendered separately. He argues that his liability should be limited to the statement he made at the press conference and should not extend to the subsequent circulation of the notice of motion. The trial judge's error, he argues, con-

En Angleterre, les tribunaux ont sans aucune équivoque rejeté la comparaison entre les affaires de libelle et les affaires de blessures corporelles. Voir par exemple *Cassell & Co. c. Broome*, [1972] 1 All E.R. 801 (C.L.), à la p. 824; *Blackshaw c. Lord*, [1983] 2 All E.R. 311 (C.A.), aux pp. 337, 340; *Sutcliffe c. Pressdram Ltd.*, [1990] 1 All E.R. 269 (C.A.), aux pp. 281, 282 et 289, et *Rantzen c. Mirror Group Newspapers (1986) Ltd.*, précité.

Il est vrai qu'en Australie, la Haute Cour à la majorité a conclu, dans *Carson c. John Fairfax & Sons Ltd.* (1993), 113 A.L.R. 577, que l'on pouvait utilement se référer aux affaires de blessures corporelles pour évaluer les dommages-intérêts généraux. Toutefois, la décision partagée du tribunal (4 contre 3) révèle le sérieux débat que cette question a engendré. Le juge McHugh, qui faisait partie de la minorité, a écrit à la p. 629:

[TRADUCTION] Les dommages-intérêts dans les actions pour blessures corporelles et les actions en diffamation ont des objectifs, des composantes et des origines différents. Ils ne sont pas comparables. Je pense que c'est une erreur de croire que l'élément de la douleur et la souffrance dans les cas de blessures personnelles peut être isolé des autres composantes des dommages-intérêts pour être comparé aux dommages-intérêts compensateurs accordés pour la diffamation.

Quoi qu'il en soit, je remarquerais que, si la trilogy devait être appliquée, le montant maximal en 1991 équivaldrait approximativement à 250 000 \$. Il s'ensuit donc que, même si la prétention des appelants sur cette question était retenue, les dommages-intérêts généraux que le jury a fixés à 300 000 \$ sont très près de la marge que les appelants considèrent raisonnable.

b) *La responsabilité solidaire à l'égard des dommages-intérêts généraux*

Manning prétend que le juge a commis une erreur en rejetant sa demande que le verdict concernant les dommages-intérêts généraux soit rendu séparément. Il fait valoir que sa responsabilité devrait être limitée à la déclaration qu'il a faite lors de la conférence de presse et ne devrait pas s'étendre à la publication subséquente de l'avis de

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tributed to the very high award by the jury. This position cannot be accepted.

requête. L'erreur du juge du procès, soutient-il, a amené le jury à accorder un montant élevé. Cette prétention ne saurait être retenue.

175 It must be remembered that at trial: a) it was the position of Manning's counsel that Manning and Scientology should be jointly and severally liable for general damages in respect of each of the defamatory statements published by them; b) Scientology admitted that it published each of the defamatory statements at issue in the action; c) Manning admitted that he published each of the defamatory statements with the exception of the notice of motion; and d) the jury specifically found that Manning published the notice of motion.

Il faut se rappeler qu'au procès: a) l'avocat de Manning a fait valoir que son client et Scientology devaient être tenus solidairement responsables des dommages-intérêts généraux relativement à chacune des déclarations diffamatoires publiées par eux; b) Scientology a admis avoir publié chacune des déclarations diffamatoires en question dans l'action; c) Manning a admis avoir publié chacune des déclarations diffamatoires, à l'exception de l'avis de requête; et d) le jury a conclu expressément que Manning avait publié l'avis de requête.

176 Thus, both Manning and Scientology published the notice of motion. It is a well-established principle that all persons who are involved in the commission of a joint tort are jointly and severally liable for the damages caused by that tort. If one person writes a libel, another repeats it, and a third approves what is written, they all have made the defamatory libel. Both the person who originally utters the defamatory statement, and the individual who expresses agreement with it, are liable for the injury. It would thus be inappropriate and wrong in law to have a jury attempt to apportion liability either for general or for special damages between the joint tortfeasors Manning and Scientology. See *Lawson v. Burns*, [1976] 6 W.W.R. 362 (B.C.S.C.), at pp. 368-69; *Gatley on Libel and Slander* (8th ed.), *supra*, at p. 600. However, this comment does not apply to aggravated damages, which are assessed on the basis of the particular malice of each joint tortfeasor.

Manning et Scientology ont donc tous deux publié l'avis de requête. Il est un principe bien établi que tous ceux qui participent à la perpétration d'un délit sont solidairement responsables pour le préjudice ainsi causé. L'auteur d'un libelle, celui qui le répète, et celui qui approuve l'écrit, se rendent tous trois coupables de libelle diffamatoire. La personne qui prononce pour la première fois la déclaration diffamatoire et celle qui exprime son accord sont toutes deux responsables du préjudice. Il serait donc injuste et erroné en droit de demander au jury de répartir la responsabilité quant aux dommages-intérêts généraux ou spéciaux entre les co-auteurs du délit, Manning et Scientology. Voir *Lawson c. Burns*, [1976] 6 W.W.R. 362 (C.S.C.-B.), aux pp. 368 et 369; *Gatley on Libel and Slander* (8^e éd.), *op. cit.*, à la p. 600. Ce commentaire ne s'applique cependant pas aux dommages-intérêts majorés qui sont évalués en fonction de la malveillance particulière de chacun des co-auteurs du préjudice.

(c) *Application of Principles to the Facts Established in this Case*

c) *L'application des principes aux faits établis en l'espèce*

177 It cannot be forgotten that at the time the libelous statement was made, Casey Hill was a young lawyer in the Crown Law office working in the litigation field. For all lawyers their reputation is of paramount importance. Clients depend on the integrity of lawyers, as do colleagues. Judges rely upon commitments and undertakings given to them by counsel. Our whole system of administra-

Il ne faut pas oublier qu'à l'époque où la déclaration diffamatoire a été faite, Casey Hill était un jeune avocat du Bureau des avocats de la Couronne, travaillant dans le domaine du contentieux. Pour tous les avocats, la réputation revêt une importance prépondérante. Les clients, tout comme les collègues, comptent sur l'intégrité des avocats. Et les juges se fient à leurs engagements et à leurs

tion of justice depends upon counsel's reputation for integrity. Anything that leads to the tarnishing of a professional reputation can be disastrous for a lawyer. It matters not that subsequent to the publication of the libel, Casey Hill received promotions, was elected a bencher and eventually appointed a trial judge in the General Division of the Court of Ontario. As a lawyer, Hill would have no way of knowing what members of the public, colleagues, other lawyers and judges may have been affected by the dramatic presentation of the allegation that he had been instrumental in breaching an order of the court and that he was guilty of criminal contempt.

This nagging doubt and sense of hurt must have affected him in every telephone call he made and received in the course of his daily work, in every letter that he sent and received and in every appearance that he made before the courts of the province of Ontario. He would never know who, as a result of the libellous statement, had some lingering suspicion that he was guilty of misconduct which was criminal in nature. He would never know who might have believed that he was a person without integrity who would act criminally in the performance of his duties as a Crown counsel. He could never be certain who would accept the allegation that he was guilty of a criminal breach of trust which was the essential thrust of the libel.

The publication of the libellous statement was very carefully orchestrated. Members of the press and the television media attended at Osgoode Hall in Toronto to meet two prominent lawyers, Morris Manning and Clayton Ruby. Osgoode Hall is the seat of the Court of Appeal and the permanent residence of the Law Society. The building is used as the background in a great many news reports dealing with important cases emanating from the Court of Appeal. In the minds of the public, it is associated with the law, with the courts and with the justice system. Manning went far beyond a simple explanation of the nature of the notice of motion. He took these very public steps without investigating in any way whether the allegations made were true.

promesses. Tout notre système d'administration de la justice repose sur la réputation d'intégrité des avocats. Tout ce qui a pour effet de ternir une réputation professionnelle peut être désastreux pour un avocat. Il importe peu qu'après la publication du libelle, Casey Hill ait reçu des promotions, ait été élu conseiller de la Société du barreau, puis nommé juge de première instance à la Division générale de la Cour de l'Ontario. À titre d'avocat, Hill n'avait aucun moyen de savoir qui du public, des collègues, des confrères et des juges avait été influencé par la présentation théâtrale de l'allégation suivant laquelle il avait contribué à violer l'ordonnance d'un tribunal et s'était rendu coupable d'outrage au criminel.

Ce doute persistant et cette blessure l'ont sûrement importuné lorsqu'il a fait ou reçu des appels téléphoniques dans le cadre de son travail quotidien, ou lorsqu'il a envoyé ou reçu des lettres et comparu devant les tribunaux de la province de l'Ontario. Il ne saurait jamais qui, en raison de la déclaration diffamatoire, le soupçonnait vaguement d'être coupable de conduite criminelle. Il ne saurait jamais qui pouvait avoir cru qu'il était dénué d'intégrité et agissait criminellement dans l'exécution de ses fonctions à titre de substitut du procureur général. Il ne saurait jamais avec certitude qui avait cru l'allégation qu'il était coupable d'abus de confiance criminel, l'essence même du libelle en l'espèce.

La publication de la déclaration diffamatoire a été très soigneusement orchestrée. Des membres de la presse écrite et télévisée se sont présentés à Osgoode Hall à Toronto pour rencontrer deux avocats éminents, Morris Manning et Clayton Ruby. Osgoode Hall abrite la Cour d'appel et la Société du barreau. L'immeuble sert d'arrière-plan à de nombreux reportages consacrés aux causes importantes portées en Cour d'appel. Dans l'esprit du public, ce lieu est associé au droit, aux tribunaux et au système de justice. Manning ne s'est pas contenté de simplement expliquer la nature de l'avis de requête. Il a pris des mesures très publiques sans avoir essayé de vérifier le bien-fondé de ses allégations.

180 At the time this press conference was called, Scientology members had been working with the sealed documents for some time and they had not yet discovered any of the sealed documents to have been opened. Yet, Scientology persisted in the publication of this libel against Hill, who was listed in their files as an "enemy".

181 Hill movingly described the effect the reading of the press reports of the press conference had upon him and of viewing the television broadcast. He put it in this way:

I was sick. I was shocked. I understood from reading it that it related to access to the documents. The type of thing that Mr. Ruby and I had been dealing with over many months, and I was just incredulous.

I was horrified when I saw it. I had had a long history of dealing with counsel for the Church of Scientology. Small problems, medium-sized problems and very serious problems had been raised between us.

Every effort was made to answer those issues as they came up. When I saw the newscast, I realized that there was really nothing I could do to stop the information from getting out. I thought it was false. I thought it was a very dramatic representation. A well-known lawyer as Mr. Manning was — and he was gowned.

And he was standing before the High Court. The indication that I had been involved in opening sealed documents and giving permission was totally false. For me, in seeing it, it was equivalent to saying I was a cheat and that I had obstructed the course of justice. It was an attack on my professional reputation and I had no way of stopping it.

I also have no way of knowing whether there are people in the community who would be in a position to place some reliance on the fact that regardless of the outcome of the criminal case, Manning, a prominent lawyer, and the Church of Scientology of Toronto, had still expressed a view on September 17th.

À l'époque où la conférence de presse a été convoquée, les membres de Scientologie vérifiaient depuis quelque temps les documents scellés, sans en avoir trouvé un seul qui ait été ouvert. Pourtant, Scientologie a persisté à publier son libelle contre Hill, qui était qualifié d'«ennemi» dans leur dossier.

Hill a décrit de façon émouvante ce qu'il avait ressenti lorsqu'il a lu les articles rédigés sur la conférence de presse et vu le reportage télévisé. Il a décrit ainsi sa réaction:

[TRADUCTION] Cela m'a rendu malade. J'étais en état de choc. Lorsque je l'ai lu, j'ai compris qu'il s'agissait de l'accès aux documents. Le genre de choses dont M. Ruby et moi avions traité pendant plusieurs mois, et je ne pouvais tout simplement pas le croire.

J'étais horrifié lorsque je l'ai vu. Je travaillais depuis longtemps avec les avocats de l'Église de scientologie. De nombreux problèmes, allant du plus insignifiant au plus sérieux, s'étaient posés entre nous.

Nous nous efforcions de résoudre ces problèmes dès qu'ils se présentaient. Lorsque j'ai vu le reportage, j'ai réalisé que je ne pouvais véritablement rien faire pour empêcher la diffusion des renseignements. Je pensais que c'était faux, qu'il s'agissait d'une représentation très dramatique. Un avocat bien connu comme M. Manning était — et il était vêtu de sa toge.

Et il se tenait devant la Haute Cour. L'allégation que j'avais participé à l'ouverture de documents scellés et donné l'autorisation est complètement fausse. J'ai eu l'impression, en voyant cela, qu'on me traitait de tricheur et que j'avais entravé le cours de la justice. C'était une attaque à ma réputation professionnelle et je n'avais aucun moyen d'y mettre fin.

Je n'avais également aucun moyen de savoir si des gens de la collectivité accorderaient une certaine importance au fait que, quelle que soit l'issue de l'affaire criminelle, Manning, un avocat en vue, et l'Église de scientologie de Toronto, avaient tout de même exprimé une opinion le 17 septembre.

The factors which should be taken into account in assessing general damages are clearly and concisely set out in *Gatley on Libel and Slander* (8th ed.), *supra*, at pp. 592-93, in these words:

SECTION 1. ASSESSMENT OF DAMAGES

1451. Province of the jury. In an action of libel "the assessment of damages does not depend on any legal rule." The amount of damages is "peculiarly the province of the jury," who in assessing them will naturally be governed by all the circumstances of the particular case. They are entitled to take into their consideration the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction or apology, and "the whole conduct of the defendant from the time when the libel was published down to the very moment of their verdict. They may take into consideration the conduct of the defendant before action, after action, and in court at the trial of the action," and also, it is submitted, the conduct of his counsel, who cannot shelter his client by taking responsibility for the conduct of the case. They should allow "for the sad truth that no apology, retraction or withdrawal can ever be guaranteed completely to undo the harm it has done or the hurt it has caused." They should also take into account the evidence led in aggravation or mitigation of the damages.

There will of necessity be some overlapping of the factors to be considered when aggravated damages are assessed. This can be seen from a further reference to the *Gatley* text at pp. 593-94 where this appears:

1452. Aggravated damages. The conduct of the defendant, his conduct of the case, and his state of mind are thus all matters which the plaintiff may rely on as aggravating the damages. "Moreover, it is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation." "In awarding 'aggravated damages' the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly

Les facteurs dont il faut tenir compte dans l'évaluation des dommages-intérêts généraux sont exposés de façon claire et concise dans l'ouvrage *Gatley on Libel and Slander* (8^e éd.), *op. cit.*, aux pp. 592 et 593:

[TRADUCTION] SECTION 1. ÉVALUATION DES DOMMAGES-INTÉRÊTS

1451. Compétence du jury. Dans une action en libelle, «l'évaluation des dommages-intérêts ne dépend d'aucune règle légale». Le montant des dommages-intérêts est «particulièrement de la compétence du jury» qui, en les évaluant, sera naturellement guidé par toutes les circonstances de l'affaire. Il est fondé à tenir compte de la conduite du demandeur, de sa situation et de son statut, de la nature du libelle, du mode et de la portée de la publication, de l'absence ou du refus de toute rétraction ou excuse, et de «l'ensemble de la conduite du défendeur à partir de la publication du libelle jusqu'au moment même de son verdict. Il peut tenir compte de la conduite du défendeur avant l'action, après l'action et pendant l'audition de l'action», et aussi, soutient-on, de la conduite de son avocat qui ne peut pas couvrir son client en prenant la responsabilité de la façon dont l'affaire est menée. Il doit reconnaître «la triste réalité qu'aucune excuse, aucune rétraction ou aucun retrait ne peut jamais assurer que seront complètement effacés le mal ou le préjudice causés». Il doit également tenir compte de la preuve présentée relativement à la majoration ou à la réduction des dommages.

Il y aura nécessairement un certain chevauchement des facteurs à considérer dans l'évaluation des dommages-intérêts majorés. On peut le constater à la lecture de cet autre extrait de *Gatley*, aux pp. 593 et 594:

[TRADUCTION] **1452. Dommages-intérêts majorés.** La conduite du défendeur, la façon dont il a mené l'affaire et son état d'esprit sont donc tous des éléments que le demandeur peut invoquer au chapitre de la majoration des dommages. «De plus, il est très bien établi que lorsque les dommages sont généraux, le jury (ou le juge si c'est à lui que revient l'adjudication) peut tenir compte des motifs et de la conduite du défendeur lorsqu'ils aggravent le préjudice causé au demandeur. Il peut y avoir malveillance ou rancune, ou la façon dont le mal a été commis peut être telle que le demandeur a été blessé dans ses sentiments intimes de dignité et de fierté. Ce sont des éléments dont le jury peut tenir compte dans l'évaluation de l'indemnité appropriée». «Dans l'adjudication de «dommages-intérêts majorés», l'indignation

legitimate motive in making a generous, rather than a more moderate award to provide an adequate solatium . . . that is because the injury to the plaintiff is actually greater, and, as the result of the conduct exciting the indignation, demands a more generous solatium."

184

In considering and applying the factors pertaining to general damages in this case it will be remembered that the reports in the press were widely circulated and the television broadcast had a wide coverage. The setting and the persons involved gave the coverage an aura of credibility and significance that must have influenced all who saw and read the accounts. The insidious harm of the orchestrated libel was indeed spread widely throughout the community.

185

The misconduct of the appellants continued after the first publication. Prior to the commencement of the hearing of the contempt motion before Cromarty J., Scientology was aware that the allegations it was making against Casey Hill were false. Yet, it persisted with the contempt hearings as did Morris Manning. At the conclusion of the contempt hearing, both appellants were aware of the falsity of the allegations. Nonetheless, when the libel action was instituted, the defence of justification was put forward by both of them. The statement of defence alleging justification or truth of the allegation was open for all the public to see. Despite their knowledge of its falsity, the appellants continued to publish the libel. Although Manning withdrew the plea of justification, this was only done in the week prior to the commencement of the trial itself. For its part, Scientology did not withdraw its plea of justification until the hearing of the appeal. Finally, the manner in which Hill was cross-examined by the appellants, coupled with the manner in which they presented their position to the jury, in light of their knowledge of the falsity of their allegations, are further aggravating factors to be taken into account.

186

When all these facts are taken into account there is no question that the award of \$300,000 by way of general damages was justified in this case.

naturelle de la cour face au préjudice causé au demandeur est un motif tout à fait légitime de fixer un montant généreux, plutôt que plus modéré, de façon à fournir une réparation adéquate [. . .] c'est-à-dire parce que le préjudice causé au demandeur est réellement plus grand et qu'il commande une réparation plus généreuse du fait qu'il résulte de la conduite qui suscite l'indignation».

Dans l'examen et l'application des facteurs relatifs aux dommages-intérêts généraux en l'espèce, il faut se rappeler que les articles de presse ont été largement diffusés et le reportage télévisé a reçu une immense couverture. Le cadre et les participants ont donné à la couverture une aura de crédibilité et d'importance qui a dû influencer tous ceux qui ont vu ou lu les reportages. Le préjudice insidieux du libelle orchestré s'était en fait répandu dans toute la communauté.

Les appelants ont poursuivi leur mauvaise conduite après la première publication. Avant le début de l'audition de la requête pour outrage devant le juge Cromarty, Scientology savait que les allégations visant Casey Hill étaient fausses. Elle a quand même poursuivi l'instance relative à l'outrage, tout comme Morris Manning. À l'issue de l'audition pour outrage, les deux appelants savaient que les allégations étaient fausses. Pourtant, lorsque l'action en libelle a été intentée, tous deux ont invoqué la défense de justification. La défense faisant valoir la justification ou la vérité de l'allégation était accessible au public. En dépit du fait qu'ils savaient que les allégations étaient fausses, les appelants ont continué à publier le libelle. Certes, Manning a retiré son plaidoyer de justification, mais seulement dans la semaine précédant le procès même. Quant à Scientology, elle n'a retiré son plaidoyer de justification qu'à l'audition de l'appel. Enfin, la manière dont les appelants ont contre-interrogé Hill, et la manière dont ils ont présenté leurs prétentions au jury, tout en sachant que leurs allégations étaient fausses, sont d'autres facteurs aggravants dont il faut tenir compte.

Si l'on tient compte de tous ces éléments, il ne fait pas de doute que les dommages-intérêts généraux de 300 000 \$ étaient justifiés en l'espèce.

(d) *Comparison with Other Libel Cases*

At the outset, I should state that I agree completely with the Court of Appeal that each libel case is unique and that this particular case is in a "class by itself". The assessment of damages in a libel case flows from a particular confluence of the following elements: the nature and circumstances of the publication of the libel, the nature and position of the victim of the libel, the possible effects of the libel statement upon the life of the plaintiff, and the actions and motivations of the defendants. It follows that there is little to be gained from a detailed comparison of libel awards.

(3) Aggravated Damages(a) *General Principles*

Aggravated damages may be awarded in circumstances where the defendants' conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous statement. The nature of these damages was aptly described by Robins J.A. in *Walker v. CFTO Ltd.*, *supra*, in these words at p. 111:

Where the defendant is guilty of insulting, high-handed, spiteful, malicious or oppressive conduct which increases the mental distress — the humiliation, indignation, anxiety, grief, fear and the like — suffered by the plaintiff as a result of being defamed, the plaintiff may be entitled to what has come to be known as "aggravated damages".

These damages take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct. Like general or special damages, they are compensatory in nature. Their assessment requires consideration by the jury of the entire conduct of the defendant prior to the publication of the libel and continuing through to the conclusion of the trial. They represent the expression of natural indignation

d) *Comparaison avec d'autres affaires de libelle*

Avant tout, j'aimerais exprimer mon accord complet avec la Cour d'appel, suivant laquelle chaque cas de libelle est unique, et que le cas en l'espèce se situe dans «une classe à part». L'évaluation des dommages-intérêts dans une affaire de libelle ressortit à l'ensemble des éléments suivants: la nature et les circonstances de la publication du libelle, le caractère et la situation de la victime du libelle, les effets possibles de la déclaration diffamatoire sur la vie du demandeur, et les actes et motivations des défendeurs. Il s'ensuit qu'il n'y a guère à gagner d'une comparaison exhaustive des montants accordés dans les affaires de libelle.

(3) Les dommages-intérêts majorésa) *Principes d'application générale*

On peut accorder des dommages-intérêts majorés lorsque le comportement des défendeurs est particulièrement abusif ou opprimant, et accroît l'humiliation et l'anxiété qu'engendre chez le demandeur la déclaration diffamatoire. Dans *Walker c. CFTO Ltd.*, précité, à la p. 111, le juge Robins de la Cour d'appel a décrit avec justesse la nature de ces dommages-intérêts:

[TRADUCTION] Lorsque le défendeur adopte un comportement insultant, abusif, méprisant, malveillant ou opprimant qui accroît l'angoisse morale — l'humiliation, l'indignation, l'anxiété, la peine, la crainte et autres sentiments semblables — chez le demandeur du fait qu'il est victime d'une diffamation, ce dernier est fondé à recevoir ce qu'on a appelé des «dommages-intérêts majorés».

Ces dommages-intérêts tiennent compte du tort additionnel que cause aux sentiments du demandeur le comportement outrageant et malveillant du défendeur. Comme les dommages-intérêts généraux ou spéciaux, les dommages-intérêts majorés sont de nature compensatoire. Pour les évaluer, le jury doit considérer l'ensemble du comportement du défendeur avant la publication du libelle et pendant tout le déroulement du procès, jusqu'à la fin.

187

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tion of right-thinking people arising from the malicious conduct of the defendant.

Ils sont l'expression de l'indignation que cause naturellement chez les personnes sensées le comportement malveillant du défendeur.

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If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff. See, for example, *Walker v. CFTO Ltd.*, *supra*, at p. 111; *Vogel, supra*, at p. 178; *Kerr v. Conlogue* (1992), 65 B.C.L.R. (2d) 70 (S.C.), at p. 93; and *Cassell & Co. v. Broome, supra*, at pp. 825-26. The malice may be established by intrinsic evidence derived from the libellous statement itself and the circumstances of its publication, or by extrinsic evidence pertaining to the surrounding circumstances which demonstrate that the defendant was motivated by an unjustifiable intention to injure the plaintiff. See *Taylor v. Despard, supra*, at p. 975.

Pour accorder des dommages-intérêts majorés, le jury doit conclure que le défendeur était motivé par une malveillance véritable et a ainsi accru le préjudice subi par le demandeur, soit en propageant davantage le tort causé à sa réputation, soit en intensifiant son angoisse morale et son humiliation. Voir par exemple *Walker c. CFTO Ltd.*, précité, à la p. 111; *Vogel*, précité, à la p. 178; *Kerr c. Conlogue* (1992), 65 B.C.L.R. (2d) 70 (C.S.), à la p. 93; et *Cassell & Co. c. Broome*, précité, aux pp. 825 et 826. On peut établir l'existence de la malveillance à l'aide d'une preuve intrinsèque qui découle de la déclaration diffamatoire elle-même et des circonstances de sa publication, ou encore à l'aide d'éléments de preuve extrinsèques relatifs aux circonstances, qui démontrent que le défendeur avait l'intention injustifiable de causer un préjudice au demandeur. Voir *Taylor c. Despard*, précité, à la p. 975.

191

There are a number of factors that a jury may properly take into account in assessing aggravated damages. For example, was there a withdrawal of the libellous statement made by the defendants and an apology tendered? If there was, this may go far to establishing that there was no malicious conduct on the part of the defendant warranting an award of aggravated damages. The jury may also consider whether there was a repetition of the libel, conduct that was calculated to deter the plaintiff from proceeding with the libel action, a prolonged and hostile cross-examination of the plaintiff or a plea of justification which the defendant knew was bound to fail. The general manner in which the defendant presented its case is also relevant. Further, it is appropriate for a jury to consider the conduct of the defendant at the time of the publication of the libel. For example, was it clearly aimed at obtaining the widest possible publicity in circumstances that were the most adverse possible to the plaintiff?

Un jury est fondé à considérer plusieurs facteurs en vue de fixer les dommages-intérêts majorés. Par exemple, les défendeurs ont-ils retiré la déclaration diffamatoire, ont-ils présenté des excuses? Dans l'affirmative, cela peut contribuer à établir l'absence, chez les défendeurs, d'un comportement malveillant justifiant des dommages-intérêts majorés. Le jury peut également considérer si le défendeur a répété le libelle, s'il s'est comporté de façon à empêcher le demandeur d'introduire l'action en libelle, s'il a fait subir au demandeur un contre-interrogatoire long et hostile, ou s'il a invoqué un plaidoyer de justification qu'il savait voué à l'échec. La manière générale dont le défendeur a présenté sa preuve est également pertinente. Par ailleurs, il convient pour un jury de considérer le comportement du défendeur à l'époque de la publication du libelle. Par exemple, visait-il manifestement à assurer la publicité la plus répandue dans des circonstances qui étaient les plus préjudiciables au demandeur?

(b) *The Application to the Facts of this Case*

In this case, there was ample evidence upon which the jury could properly base their finding of aggravated damages. The existence of the file on Casey Hill under the designation "Enemy Canada" was evidence of the malicious intention of Scientology to "neutralize" him. The press conference was organized in such a manner as to ensure the widest possible dissemination of the libel. Scientology continued with the contempt proceedings although it knew its allegations were false. In its motion to remove Hill from the search warrant proceedings, it implied that he was not trustworthy and might act in those proceedings in a manner that would benefit him in his libel action. It pleaded justification or truth of its statement when it knew it to be false. It subjected Hill to a demeaning cross-examination and, in its address to the jury, depicted Hill as a manipulative actor.

It is, as well, appropriate for an appellate court to consider the post-trial actions of the defendant. It will be recalled that Scientology, immediately after the verdict of the jury, repeated the libel, thus forcing the plaintiff to seek and obtain an injunction restraining Scientology from repeating the libel. It did not withdraw its plea of justification until the hearing of the appeal. All this indicates that the award of aggravated damages was strongly supported by the subsequent actions of Scientology.

In summary, every aspect of this case demonstrates the very real and persistent malice of Scientology. Their actions preceding the publication of the libel, the circumstances of its publication and their subsequent actions in relation to both the search warrant proceedings and this action amply confirm and emphasize the insidious malice of Scientology. Much was made of their apology tendered at the time of the hearing in the Court of Appeal. There is a hollow ring to that submission when it is remembered that it was not until the fifth day of oral argument before the Court of Appeal that the apology was tendered. Scientology can

b) *Application aux faits de l'espèce*

Dans la présente affaire, il y avait une preuve abondante sur le fondement de laquelle le jury pouvait à bon droit accorder des dommages-intérêts majorés. L'existence d'un dossier sur Casey Hill, intitulé «ennemi Canada», démontre l'intention malveillante de l'Église de le «neutraliser». La conférence de presse a été planifiée de manière à garantir la plus grande diffusion possible du libelle. Scientology a poursuivi les procédures pour outrage tout en sachant que ses allégations étaient fausses. Dans sa requête en vue de faire retirer Hill des procédures relatives au mandat de perquisition, elle a laissé entendre qu'il n'était pas digne de confiance et qu'il était susceptible d'agir dans ces procédures d'une manière qui lui profiterait dans son action pour libelle. Elle a plaidé la justification ou la vérité de sa déclaration qu'elle savait fausse. Elle a soumis Hill à un contre-interrogatoire dégradant et, dans son exposé au jury, l'a décrit comme un homme manipulateur.

Il est également approprié pour un tribunal d'appel de considérer les actes du défendeur après le procès. Il y a lieu de rappeler qu'immédiatement après que le verdict du jury, Scientology a réitéré le libelle, forçant ainsi le demandeur à demander et à obtenir une injonction interdisant à Scientology de le répéter. Elle n'a retiré son plaidoyer de justification qu'à l'audition de l'appel. Tous ces éléments permettent de conclure que les actions subséquentes de Scientology justifiaient amplement des dommages-intérêts majorés.

Bref, chaque aspect de cette affaire révèle la malveillance très réelle et constante de Scientology. Ses actions antérieures à la publication du libelle, les circonstances de sa publication et ses actions subséquentes dans les procédures relatives au mandat de perquisition et à la présente action confirment et font amplement ressortir la malveillance insidieuse de Scientology. On a fait grand cas des excuses présentées au moment de l'audition en Cour d'appel. Cette prétention sonne faux lorsque l'on se rappelle que ce n'est que le cinquième jour des débats devant la Cour d'appel que les excuses ont été présentées. Scientology ne peut

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gain little comfort from such a late and meaningless apology.

guère tirer profit d'excuses aussi tardives et dénuées de sens.

195 These damages were awarded solely against Scientology and are based upon the misconduct of that appellant. There is no question of Manning being in any way responsible for these damages. Indeed, there cannot be joint and several responsibility for either aggravated or punitive damages since they arise from the misconduct of the particular defendant against whom they are awarded. See, for example, *Sun Life, supra*, at p. 1310; *Egger v. Chelmsford*, [1965] 1 Q.B. 248 (C.A.), at pp. 263 and 265; *Vogel, supra*, at p. 171; S. M. Waddams, *The Law of Damages* (2nd ed. 1991), at pp. 11-23 and 11-24. Scientology's behaviour throughout can only be characterized as recklessly high-handed, supremely arrogant and contumacious. There seems to have been a continuing conscious effort on Scientology's part to intensify and perpetuate its attack on Casey Hill without any regard for the truth of its allegations.

Seule Scientologie a été condamnée à verser des dommages-intérêts majorés, en raison de sa mauvaise conduite. Il n'est aucunement question que Manning soit de quelque façon responsable relativement à ces dommages-intérêts. En effet, il ne peut y avoir responsabilité solidaire à l'égard de dommages-intérêts majorés ou punitifs puisque ceux-ci découlent de la mauvaise conduite du défendeur condamné à les verser. Voir, par exemple, *Sun Life*, précité, à la p. 1310; *Egger c. Chelmsford*, [1965] 1 Q.B. 248 (C.A.), aux pp. 263 et 265; *Vogel*, précité, à la p. 171; S. M. Waddams, *The Law of Damages* (2^e éd. 1991), aux pp. 11-23 et 11-24. Le comportement de Scientologie pendant tout ce temps ne peut être qualifié que d'imprudemment abusif, extrêmement arrogant et entêté. Elle semble avoir mis un effort conscient et constant à intensifier et à perpétuer son attaque contre Casey Hill sans jamais considérer la véracité de ses allégations.

(4) Punitive Damages

(a) *General Principles*

(4) Les dommages-intérêts punitifs

a) *Principes d'application générale*

196 Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

On peut accorder des dommages-intérêts punitifs lorsque la mauvaise conduite du défendeur est si malveillante, opprimante et abusive qu'elle choque le sens de dignité de la cour. Les dommages-intérêts punitifs n'ont aucun lien avec ce que le demandeur est fondé à recevoir au titre d'une compensation. Ils visent non pas à compenser le demandeur, mais à punir le défendeur. C'est le moyen par lequel le jury ou le juge exprime son outrage à l'égard du comportement inacceptable du défendeur. Ils revêtent le caractère d'une amende destinée à dissuader le défendeur et les autres d'agir ainsi. Il importe de souligner que les dommages-intérêts punitifs ne devraient être accordés que dans les situations où les dommages-intérêts généraux et majorés réunis ne permettent pas d'atteindre l'objectif qui consiste à punir et à dissuader.

197 Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a

Contrairement aux dommages-intérêts compensatoires, les dommages-intérêts punitifs ne sont pas

much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?

This was the test formulated by Robins J.A. in *Walker v. CFTO Ltd.*, *supra*. In that case, he found that the general damages award of \$908,000 was obviously sufficient to satisfy whatever need there was for punishment and deterrence. He found that, in those circumstances, the \$50,000 punitive damage award served no rational purpose. The Court of Appeal, in the case at bar, applied the same reasoning and upheld the award of punitive damages.

Punitive damages can and do serve a useful purpose. But for them, it would be all too easy for the large, wealthy and powerful to persist in libelling vulnerable victims. Awards of general and aggravated damages alone might simply be regarded as a licence fee for continuing a character assassination. The protection of a person's reputation arising from the publication of false and injurious statements must be effective. The most effective means of protection will be supplied by the knowledge that fines in the form of punitive damages may be awarded in cases where the defendant's conduct is truly outrageous.

généralisés. En conséquence, les tribunaux disposent d'une latitude et d'une discrétion beaucoup plus grandes en appel. Le contrôle en appel devrait consister à déterminer si les dommages-intérêts punitifs servent un objectif rationnel. En d'autres termes, la mauvaise conduite du défendeur était-elle si outrageante qu'il était rationnellement nécessaire d'accorder des dommages-intérêts punitifs dans un but de dissuasion?

C'est le critère qui a été formulé par le juge Robins dans *Walker c. CFTO Ltd.*, précité. Dans cette affaire, le juge a conclu que les dommages-intérêts généraux de 908 000 \$ étaient de toute évidence suffisants pour satisfaire quelque nécessité de punir et de dissuader. Il a jugé que, dans ces circonstances, les dommages-intérêts punitifs de 50 000 \$ ne servaient aucun objectif rationnel. En l'espèce, la Cour d'appel a suivi le même raisonnement et maintenu les dommages-intérêts punitifs.

Les dommages-intérêts punitifs peuvent servir, et servent effectivement, un objectif utile. S'ils n'existaient pas, il ne serait que trop facile pour les gens importants, puissants et riches de persister à répandre des libelles contre des victimes vulnérables. Les dommages-intérêts généraux et majorés à eux seuls pourraient simplement être considérés comme la redevance à payer pour être autorisé à continuer cette atteinte à la réputation. La protection de la réputation d'une personne à la suite de la publication de déclarations fausses et injurieuses doit être efficace. La meilleure protection est de faire savoir que des amendes, sous forme de dommages-intérêts punitifs, peuvent être imposées lorsque le comportement du défendeur est véritablement outrageant.

(b) *The Application to the Facts of this Case*

There can be no doubt that the conduct of Scientology in the publication of the injurious false statement pertaining to its "enemy" was malicious. Its publication was carefully planned and carried out in a manner which ensured its widest possible dissemination in the most damaging manner imaginable. The allegation made against Hill was devastating. It was said that he had been guilty of breach of trust, breach of a court order and that his

b) *Application aux faits de l'espèce*

Il ne fait aucun doute que le comportement de Scientology dans la publication de la déclaration fausse et injurieuse concernant son «ennemi» était empreint de malveillance. Elle a fait en sorte que sa publication, soigneusement planifiée, soit exécutée de façon à obtenir la diffusion la plus vaste possible, de la manière la plus préjudiciable que l'on puisse imaginer. L'allégation visant Hill était dévastatrice. On prétendait qu'il s'était rendu cou-

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conduct and behaviour was criminal. Scientology's actions from the time of publication, throughout the trial, and after the trial decision was rendered constituted a continuing attempt at character assassination by means of a statement which it knew to be false. It was such outrageous conduct that it cried out for the imposition of punitive damages.

pable d'abus de confiance, de manquement à une ordonnance judiciaire et de comportement criminel. Les agissements de Scientology à compter de la publication, pendant tout le procès et après que la décision au procès, constituaient une tentative persistante d'attenter à la moralité au moyen d'une déclaration qu'elle savait fausse. Il s'agissait d'un comportement si outrageant qu'il appelle l'imposition de dommages-intérêts punitifs.

201 There might have been some concern that, in light of the award of general and aggravated damages totalling \$800,000, there might not be a rational basis for punitive damages. However any lingering doubt on that score is resolved when Scientology's persistent misconduct subsequent to the trial is considered. On the very next day following the verdict, Scientology republished the libel in a press release delivered to the media. It then brought a motion to adduce fresh evidence which it stated would have a bearing "on the credibility and reputation of the plaintiff S. Casey Hill" which, if presented at trial, "would probably have changed the result". Its actions were such that Hill was forced to bring an application for an injunction enjoining Scientology from republishing the libel. In his reasons for granting the injunction, Carruthers J. stated that he was forced to take that action because "no amount awarded on account of punitive damages would have prevented or will prevent the Church of Scientology from publishing defamatory statements about the plaintiff". Even the injunction did not deter Scientology which moved to set it aside. Further, in its notice of appeal of the libel judgment, Scientology alleged that the trial judge had erred in ruling the decision of Cromarty J. in the contempt proceedings was *res judicata* of the issues raised in the libel trial.

On a pu se demander si, compte tenu du total de 800 000 \$ accordé au titre des dommages-intérêts généraux et majorés, il n'existait plus de motif rationnel d'accorder des dommages-intérêts punitifs. Toutefois, tout doute subsistant à cet égard est dissipé par la persistance de la conduite de Scientology après le procès. Le lendemain même du verdict, Scientology a de nouveau publié le libelle dans un communiqué de presse transmis aux médias. Elle a ensuite introduit une requête en vue de produire de nouveaux éléments de preuve qui, selon elle, auraient un effet [TRADUCTION] «sur la crédibilité et la réputation du demandeur S. Casey Hill» et qui, s'ils avaient été présentés au procès, «en auraient probablement changé l'issue». Ses actions étaient telles que Hill a été contraint de demander une injonction interdisant à Scientology de publier de nouveau le libelle. Dans ses motifs, le juge Carruthers s'est dit contraint d'accorder l'injonction puisque [TRADUCTION] «aucun montant accordé à titre de dommages-intérêts punitifs n'aurait empêché ou n'empêchera l'Église de Scientology de publier des déclarations diffamatoires sur le demandeur». Même l'injonction n'a pas freiné Scientology, qui en a demandé l'annulation. En outre, dans son avis d'appel du jugement sur le libelle, Scientology a allégué que le juge du procès avait commis une erreur en statuant que la décision du juge Cromarty dans l'instance relative à l'outrage était chose jugée quant aux questions soulevées dans le procès pour libelle.

202 During the appeal, it was conceded and the evidence and events confirmed that in all likelihood, no amount of general or aggravated damages would have deterred Scientology. Clearly then, this was an appropriate case for an award of punitive damages. Scientology did not withdraw its plea of

Au cours de l'appel, il a été concédé qu'il était fort probable qu'aucun montant de dommages-intérêts généraux et majorés n'aurait pu dissuader Scientology, et la preuve et les faits ont confirmé cela. Il est donc évident qu'il convenait en l'espèce d'accorder des dommages-intérêts punitifs. Scien-

justification until the first day of the oral argument in the Court of Appeal. Nor was any apology tendered by Scientology until the fifth day of oral argument before the Court of Appeal.

The award of punitive damages, therefore, served a rational purpose in this case. Further, the circumstances presented in this exceptional case demonstrate that there was such insidious, pernicious and persistent malice that the award for punitive damages cannot be said to be excessive. Scientology has alleged that the size of the award of punitive damages had a chilling effect on its right to freedom of expression. However as stated earlier, in spite of the slow and methodical progress of this case to trial and appeal, and despite the motion brought six years before the trial which drew attention to the need for evidence, Scientology adduced no evidence as to the chilling effect of the award. In its absence, this argument should not be considered. It may be that different factors will have to be taken into consideration where evidence is adduced and where a member of the media is a party to the action. However, those are considerations for another case on another day.

IV. Disposition

The appeal is dismissed with costs.

APPENDIX A

CFTO BROADCAST

The Toronto Church of Scientology has filed charges of contempt of court against two provincial lawyers. The Church believes the lawyers violated a court order by opening sealed documents which were seized last year in a raid on the Church's headquarters. A report from CFTO's Tim Webber:

Webber:

Eighteen months ago, more than one hundred O.P.P. officers stormed out of three buses and into the offices of the Church of Scientology. They seized hundreds of thousands of documents in two days of searching. Police said they were looking for evidence of tax fraud, consumer fraud and other indictable

tologie n'a retiré son plaidoyer de justification que le premier jour des débats devant la Cour d'appel. En outre, elle n'a présenté des excuses que le cinquième jour des débats devant la Cour d'appel.

Les dommages-intérêts punitifs servaient donc un objectif rationnel en l'espèce. Par ailleurs, les circonstances de cette affaire exceptionnelle démontrent qu'il y a eu une malveillance si insidieuse, pernicieuse et persistante que le montant de dommages-intérêts punitifs ne peut être jugé excessif. Scientology a allégué que le montant des dommages-intérêts punitifs avait un effet paralysant sur son droit à la liberté d'expression. Toutefois, je le répète, en dépit du déroulement lent et méthodique de la présente affaire au procès et en appel, et de la requête présentée six ans avant le procès, qui a fait ressortir la nécessité de produire une preuve, Scientology n'a présenté aucun élément de preuve quant à l'effet paralysant qu'aurait le montant accordé. En l'absence d'une telle preuve, cet argument ne doit pas être considéré. Il y aura sans doute lieu de tenir compte de différents facteurs lorsqu'une preuve sera produite et que des membres des médias seront parties à l'action. Toutefois, ce sont là des considérations qui devront attendre une autre occasion.

IV. Dispositif

Le pourvoi est rejeté avec dépens.

ANNEXE A

REPORTAGE DE CFTO

[TRADUCTION] L'Église de scientologie de Toronto a déposé des accusations d'outrage au tribunal contre deux avocats provinciaux. L'Église croit que les avocats ont violé une ordonnance judiciaire en ouvrant des documents scellés, saisis l'an dernier lors d'une descente au bureau principal de l'Église. Voici le reportage de Tim Webber de CFTO:

Webber:

Il y a dix-huit mois, plus de cent agents de la PPO, transportés dans trois autobus, ont pris d'assaut les bureaux de l'Église de scientologie. Ils ont saisi des centaines de milliers de documents au cours d'une fouille qui a duré deux jours. Aux dires de la police, ils étaient à la recherche de preuves de fraude fiscale,

offences. Many of these seized documents were deemed confidential by the Church. Some they said were confessions between priests and penitents and they convinced a judge to order about two hundred of the documents sealed. Today, lawyers for the Church filed charges alleging that the sealing order has been violated.

Manning:

The documents were ordered sealed by Mr. Justice Osler, pursuant to a request by counsel, in a very serious matter, and they were opened and revealed to persons whom we say were unauthorized to do so.

Webber:

The charges are against Jerome Cooper, a lawyer for Consumer and Commercial Relations, and Crown Attorney S. Casey Hill. The documents filed today alleged that the two convinced another Supreme Court Justice to allow the Ministry of Consumer and Commercial Relations to view the sealed documents in the company of O.P.P. officers. One of the lawyers being charged, Jerome Cooper, today told us he had absolutely no comment on the matter. The trial date has already been set for the 17th of January, but lawyers for the Church of Scientology are hoping to convince the defendants and the Court so start even sooner.

APPENDIX B

CBC BROADCAST

The Church of Scientology has filed a suit against two Toronto based Crown Attorneys. The Church had its offices raided by police and documents seized in March of 1983. Lawyers for the Church say those documents were opened and read by persons not authorized to do so.

Manning:

They were confidential documents which have been ordered sealed by Supreme Court of Ontario Justices which were opened with the permission of counsel for the Crown. And this constitutes, in the opinion of the Church, a contempt of court. We've had a date set in January. But hopefully, we can get a date set earlier with the consent of the Chief Justice of the Trial Division, or the Chief Justice of Ontario on the basis that

de fraude à l'égard de consommateurs et d'autres actes criminels. Nombre des documents saisis étaient considérés confidentiels par l'Église, parce que certains étaient des confessions entre prêtres et pénitents. L'Église a pu convaincre un juge d'ordonner qu'environ deux cents de ces documents soient scellés. Aujourd'hui, les avocats de l'Église ont déposé des accusations alléguant que l'ordonnance de mise sous scellés a été violée.

Manning:

Le juge Osler a ordonné que les documents soient scellés à la demande des avocats dans le cadre d'une affaire très grave, et ces documents ont été ouverts et révélés à des personnes qui à notre avis n'étaient pas autorisées.

Webber:

Les accusations visent Jerome Cooper, avocat au ministère de la Consommation et du Commerce, et S. Casey Hill, substitut du procureur général. Suivant les documents déposés aujourd'hui, les deux avocats ont convaincu un autre juge de la Cour suprême d'autoriser le ministère de la Consommation et du Commerce à examiner les documents scellés en compagnie d'agents de la PPO. Un des avocats accusés, Jerome Cooper, nous a affirmé aujourd'hui qu'il n'avait absolument aucun commentaire à faire sur cette affaire. La date du procès a déjà été fixée au 17 janvier, mais les avocats de l'Église de scientologie espèrent convaincre les défenseurs et la Cour de commencer encore plus tôt.

ANNEXE B

REPORTAGE DE LA SRC

[TRADUCTION] L'Église de scientologie a institué une action contre deux substituts du procureur général à Toronto. En mars 1983, l'Église a reçu la visite de la police à ses bureaux, où des documents ont été saisis. Les avocats de l'Église affirment que ces documents ont été ouverts et examinés par des personnes non autorisées à le faire.

Manning:

Il s'agissait de documents confidentiels dont la mise sous scellé avait été ordonnée par des juges de la Cour suprême de l'Ontario, et qui ont été ouverts avec l'autorisation du substitut du procureur général. Cela constitue, de l'avis de l'Église, un outrage au tribunal. Le procès doit commencer en janvier, mais nous espérons obtenir une date plus rapprochée avec le consentement du juge en chef de première instance ou

it's a very important matter. It's important to the administration of justice.

APPENDIX C

GLOBE AND MAIL

The Church of Scientology of Toronto is asking the Supreme Court of Ontario to find a Crown prosecutor and a lawyer with the Ontario Ministry of Consumer and Commercial Relations in contempt of court.

Morris Manning, a lawyer acting for the church, said in an interview yesterday that he has filed a motion asking for S. Casey Hill, a prosecutor with the Ontario Ministry of the Attorney-General, and Jerome Cooper, a lawyer with the Consumer Ministry, to be jailed or fined.

The motion claims that Mr. Cooper misled Mr. Justice Jean-Charles Sirois of the Supreme Court of Ontario into releasing to the Consumer Ministry documents seized by the Ontario Provincial Police in a raid on the Church's headquarters.

The motion says Judge Sirois was not told that many of the documents had been ordered sealed by another Ontario Supreme Court judge while the Church contests the legality of the search warrant used by the O.P.P. in the raid last year.

The motion claims Mr. Hill, who represented the Attorney-General during the search warrant hearings "aided and abetted in the misleading of Mr. Justice Sirois".

A hearing on the motion has been set for January 17.

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. — I have had the advantage of reading the reasons of my colleague Justice Cory and, except on one point, generally agree with them as well as with his disposition of this appeal.

First, however, in order to dispel any possible confusion regarding the applicability of the *Canadian Charter of Rights and Freedoms* to the common law, I note that this issue can be easily sum-

du juge en chef de l'Ontario pour le motif qu'il s'agit d'une affaire très importante. Elle est importante pour l'administration de la justice.

ANNEXE C

GLOBE AND MAIL

[TRADUCTION] L'Église de scientologie de Toronto s'adresse à la Cour suprême de l'Ontario afin que soient déclarés coupables d'outrage au tribunal un substitut du procureur général et un procureur du ministère de la Consommation et du Commerce de l'Ontario.

Morris Manning, avocat agissant pour le compte de l'Église, a affirmé au cours d'une entrevue hier qu'il a déposé une requête réclamant que S. Casey Hill, avocat au ministère du Procureur général de l'Ontario, et Jerome Cooper, avocat au ministère de la Consommation, soient condamnés à une amende ou à une peine d'emprisonnement.

Suivant la requête, M. Cooper a induit en erreur le juge Jean-Charles Sirois de la Cour suprême de l'Ontario afin qu'il libère, en faveur du ministère de la Consommation, des documents saisis par la Police provinciale de l'Ontario lors d'une descente effectuée au bureau principal de l'Église.

L'Église allègue également dans la requête que le juge Sirois n'a pas été avisé que plusieurs documents avaient été mis sous scellés sur ordonnance d'un juge de la Cour suprême de l'Ontario pendant que l'Église conteste la légalité du mandat de perquisition utilisé par la PPO au cours de la descente effectuée l'an dernier.

On fait valoir dans la requête que M. Hill, qui représentait le procureur général pendant les auditions relatives au mandat de perquisition, «a aidé et encouragé à induire le juge Sirois en erreur».

Une audition sur la requête se tiendra le 17 janvier.

Les motifs suivants ont été rendus par

LE JUGE L'HEUREUX-DUBÉ — J'ai eu l'avantage de prendre connaissance des motifs de mon collègue le juge Cory et, sauf sur un point, je suis substantiellement d'accord avec lui et avec le résultat auquel il arrive.

En premier lieu, toutefois, afin de dissiper toute confusion possible quant à l'applicabilité de la *Charte canadienne des droits et libertés* à la common law, cette question peult, à mon avis, se

marized in the following two principles, both of which were first articulated by McIntyre J. in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573:

1. The *Charter* does not directly apply to the common law unless it is the basis of some governmental action.
2. Even though the *Charter* does not directly apply to the common law absent government action, the common law must nonetheless be developed in accordance with *Charter* values. (To the same effect, see *R. v. Salituro*, [1991] 3 S.C.R. 654, *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Park*, [1995] 2 S.C.R. 836, per L'Heureux-Dubé J.)

In other words, the basic rule is that, absent government action, the *Charter* only applies indirectly to the common law.

réduire simplement aux deux propositions suivantes, formulées pour la première fois par le juge McIntyre dans l'arrêt *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573:

1. La *Charte* ne s'applique pas directement à la common law sauf dans la mesure où elle constitue le fondement d'une action gouvernementale.
2. Quoique la *Charte* ne s'applique pas directement à la common law en l'absence d'une action gouvernementale, la common law doit néanmoins évoluer de manière à être compatible avec les valeurs qui sous-tendent la *Charte*. (Dans le même sens, voir *R. c. Salituro*, [1991] 3 R.C.S. 654, *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, et *R. c. Park*, [1995] 2 R.C.S. 836, le juge L'Heureux-Dubé.)

En d'autres termes, la règle fondamentale est la suivante: en l'absence d'une action gouvernementale, la *Charte* ne s'applique qu'indirectement à la common law.

207 In light of the above, I agree with Cory J. that where the common law is "challenged" on *Charter* grounds, a traditional s. 1 analysis will generally not be appropriate. Instead, "*Charter* values, framed in general terms, should be weighed against the principles which underlie the common law. The *Charter* values will then provide the guidelines for any modification to the common law which the court feels is necessary" (para. 97). As well, I agree with Cory J. that "the party who is alleging that the common law is inconsistent with the *Charter* should bear the onus of proving both that the common law fails to comply with *Charter* values and that, when these values are balanced, the common law should be modified" (para. 98). Such an approach is, in my view, consistent with the fact that, absent government action, the *Charter* only applies indirectly to the common law.

Compte tenu de ce qui précède, je suis d'accord avec le juge Cory que lorsque la common law fait l'objet d'une «contestation» fondée sur la *Charte*, en général l'analyse traditionnelle effectuée dans le cadre de l'article premier n'est pas appropriée, mais plutôt, que «[f]ormulées en termes généraux, les valeurs de la *Charte* devraient être pondérées en regard des principes qui inspirent la common law. Les valeurs de la *Charte* offriront alors des lignes directrices quant à toute modification de la common law que la cour estime nécessaire» (par. 97). De même, comme le juge Cory, j'estime que «[l]a partie qui allègue que la common law est incompatible avec la *Charte* doit [...] établir à la fois que la common law ne respecte pas les valeurs de la *Charte* et que, suivant la pondération de ces valeurs, la common law doit être modifiée» (par. 98). Cette approche, à mon avis, va de pair avec le fait qu'en l'absence d'une action gouvernementale, la *Charte* ne s'applique qu'indirectement à la common law.

208 Applying this approach in the case at hand, I agree with Cory J.'s conclusion that the common law of defamation, as it is applied to the parties in

Appliquant ici cette approche, je souscris à la conclusion du juge Cory que la common law de la diffamation, telle qu'elle s'applique aux parties à

this action, is consistent with the values enshrined in the *Charter*. Accordingly, I agree with my colleague that there is no need to amend or alter the common law. In particular, I agree that the "actual malice" rule adopted by the U.S. Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), should not be adopted into the Canadian common law of defamation.

Second, the one issue on which I part company with my colleague concerns the scope of the defence of qualified privilege. Traditionally, this Court has held that the defence of qualified privilege is available with respect to reports of judicial proceedings, but not with respect to reports of pleadings in purely private litigation upon which no judicial action has yet been taken: *Gazette Printing Co. v. Shallow* (1909), 41 S.C.R. 339. The appellants, however, argue that *Shallow* is no longer good law as it had been overtaken by this Court's more recent decision in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326. My colleague appears to accept this argument. Accordingly, he broadens the scope of the defence of qualified privilege, making it available with respect to reports of pleadings upon which no judicial action has yet been taken. I disagree. In my view, *Shallow* and *Edmonton Journal* are entirely consistent. In this respect, I adopt the following statement from the judgment of the Court of Appeal in the case at hand ((1994), 18 O.R. (3d) 385, at p. 427):

We were urged to extrapolate from *Edmonton Journal* the proposition that the common law of defamation should respect such constitutional forms of expression as the reporting of information pertaining to intended court proceedings by conferring qualified privilege on the occasion of the publication of such reports. With respect, we do not agree. *Edmonton Journal* struck down, in the name of freedom of expression, statutory provisions which sought to inhibit the publication of the details of pending matrimonial and other civil actions. But it by no means follows that the publication of such

cette action, est conforme aux valeurs consacrées dans la *Charte*. Aussi n'est-il pas nécessaire, comme mon collègue l'indique, de changer ou de modifier la common law. En particulier, je conviens que la règle de la «malveillance véritable» adoptée par la Cour suprême des États-Unis dans l'arrêt *New York Times Co. c. Sullivan*, 376 U.S. 254 (1964), ne devrait pas être intégrée à la common law de la diffamation au Canada.

En deuxième lieu, la seule question sur laquelle je me dissocie de mon collègue concerne la portée de la défense d'immunité relative. Traditionnellement, notre Cour a conclu qu'il était possible d'invoquer la défense d'immunité relative en ce qui concerne le compte rendu de procédures judiciaires, mais qu'il n'en était pas de même à l'égard de comptes rendus d'actes de procédure dans le cadre de litiges purement privés, sur le fondement desquels aucune action judiciaire n'a encore été instituée: *Gazette Printing Co. c. Shallow* (1909), 41 R.C.S. 339. Or, les appelants font valoir que l'arrêt *Shallow* ne traduit plus l'état du droit vu la décision plus récente de notre Cour dans *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326. Mon collègue paraît accepter cet argument. Il étend donc la défense d'immunité relative aux comptes rendus d'actes de procédure sur le fondement desquels aucune action judiciaire n'a encore été intentée. Je ne suis pas d'accord. À mon avis, les arrêts *Shallow* et *Edmonton Journal* sont tout à fait compatibles. À cet égard, j'adopte l'extrait suivant de la décision de la Cour d'appel dans le cas qui nous occupe ((1994), 18 O.R. (3d) 385, à la p. 427):

[TRADUCTION] On nous propose d'extrapoler de l'arrêt *Edmonton Journal* la proposition selon laquelle la common law de la diffamation devrait respecter les formes constitutionnelles d'expression que constituent les comptes rendus de procédures judiciaires que l'on se propose d'intenter, en conférant l'immunité relative à la publication de ces comptes rendus. Avec égards, nous ne sommes pas d'accord. L'arrêt *Edmonton Journal* a eu pour effet d'annuler, au nom de la liberté d'expression, des dispositions législatives interdisant la publication de renseignements concernant des actions matrimoniales ou autres actions civiles en cours. Cela ne signifie aucunement que la publication de ces renseignements devrait

details should be accorded the mantle of qualified privilege if they are defamatory.

Edmonton Journal and *Gazette Printing* stand together without conflict: there is a right to publish details of judicial proceedings before they are heard in open court, but such publication does not enjoy the protection of qualified privilege if it is defamatory. As Duff J. noted in the extract from p. 364 of *Gazette Printing* set out above, no such privilege is necessary if the statements published are true, and no such privilege is desirable if they are not true.

jour de la protection de l'immunité relative si ceux-ci s'avèrent diffamatoires.

Les arrêts *Edmonton Journal* et *Gazette Printing* n'entrent pas en conflit: le droit de publier les détails de procédures judiciaires avant qu'elles ne soient entendues en audience publique existe, mais cette publication ne jouit pas de la protection de l'immunité relative si son contenu est diffamatoire. Ainsi que le juge Duff l'a indiqué dans le passage tiré de la p. 364 de l'arrêt *Gazette Printing* ci-dessus, l'immunité n'est pas nécessaire si les déclarations publiées sont véridiques, et elle n'est pas souhaitable si les déclarations sont fausses.

210 Subject to the above, I would dispose of this appeal as does my colleague Cory J.

Sous réserve de ce qui précède, je trancherais le pourvoi comme le suggère mon collègue le juge Cory.

Appeal dismissed with costs.

Pourvoi rejeté avec dépens.

Solicitors for the appellant Morris Manning: Weir & Foulds, Toronto.

Procureurs de l'appelant Morris Manning: Weir & Foulds, Toronto.

Solicitors for the appellant the Church of Scientology of Toronto: Gowling, Strathy & Henderson, Kitchener.

Procureurs de l'appelante l'Église de scientologie de Toronto: Gowling, Strathy & Henderson, Kitchener.

Solicitors for the respondent: Tory Tory DesLauriers & Binnington, Toronto.

Procureurs de l'intimé: Tory Tory DesLauriers & Binnington, Toronto.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Procureur de l'intervenant le procureur général de l'Ontario: Le ministère du Procureur général, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Robert Sharpe and Kent Roach, Toronto.

Procureurs de l'intervenante l'Association canadienne des libertés civiles: Robert Sharpe et Kent Roach, Toronto.

Solicitors for the interveners the Writers' Union of Canada, PEN Canada, the Canadian Association of Journalists, the Periodical Writers Association of Canada, and the Book and Periodical Council: Davies, Ward & Beck, Toronto.

Procureurs des intervenants Writers' Union of Canada, PEN Canada, l'Association canadienne des journalistes, Periodical Writers Association of Canada, et Book and Periodical Council: Davies, Ward & Beck, Toronto.

Solicitors for the interveners the Canadian Daily Newspaper Association, the Canadian Community Newspapers Association, the Canadian Association of Broadcasters, the Radio-Television News Directors Association of Canada, the Canadian Book Publishers' Council and the Canadian

Procureurs des intervenants l'Association canadienne des éditeurs de quotidiens, Canadian Community Newspapers Association, l'Association canadienne des radiodiffuseurs, l'Association canadienne des directeurs de l'information en radio-télévision, Canadian Book Publishers'

*Magazine Publishers' Association: Blake, Cassels
& Graydon, Toronto.*

*Council et Canadian Magazine Publishers' Asso-
ciation: Blake, Cassels & Graydon, Toronto.*

Neutral Citation Number: [2005] EWCA Civ 75
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL APPEALS DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
The Hon Mr Justice Eady

TAB 3

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 3 February 2005

Before :

LORD PHILLIPS OF WORTH MATRAVERS, MR
LORD JUSTICE SEDLEY
and
LORD JUSTICE JONATHAN PARKER

Between :

DOW JONES & CO INC
- and -
YOUSEF ABDUL LATIF JAMEEL

Appellant

Respondent

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Gavin Millar QC & Anthony Hudson (instructed by **Messrs Finers Stephens Innocent**) for
the Appellant
James Price QC & Justin Rushbrooke (instructed by **Carter-Ruck**) for the Respondent

Judgment

Lord Justice Phillips MR :

This is the judgment of the Court

Introduction

1. This is an appeal against four interlocutory rulings against the defendant ('Dow Jones') made by Eady J in two separate judgments on 6 July 2004. It was heard conjointly with an appeal against a preliminary ruling given by Eady J on 5 December 2003 in *Mohammed Abdul Latif Jameel and Abdul Latif Jameel Company Limited v The Wall Street Journal Europe SPRL* ('the Mohammed Jameel Action'). That action resulted in awards of damages in favour of each of the claimants. We heard other grounds of appeal against that result at an earlier sitting. In a judgment which we are handing down at the same time as this we have dismissed all the grounds of appeal in that action.
2. The claimant in this action is the brother of the first claimant in the *Mohammed Jameel* Action. Dow Jones is, we presume, affiliated with the defendant in the *Mohammed Jameel* Action. Dow Jones publishes *The Wall Street Journal* and *The Wall Street Journal On-line*. The latter is a publication made on a world wide web site, access to which is available to subscribers. In each action the individual claimants complain of publications implying that they have been, or are suspected of having been, involved in funding al Qaeda. In each action the defendants have not sought to justify the defamations alleged. Rather their case has been that they have been acting as responsible journalists in reporting statements made by the US authorities.
3. One of the rulings that we deal with in this appeal struck out from the defence a plea which attacked what has been described as 'the presumption of damage' on the ground that it is not compatible with Article 10 of the European Convention on Human Rights. More precisely, this plea was as follows:

"The Defendant ...will contend that Article 10 of the European Convention on Human Rights precludes [the Claimant] from relying on any legal presumption of damage to establish standing, injury or harm."
4. This attack was, of course, made in respect of a claim by an individual claimant. In the *Mohammed Jameel* Action what appeared to be a similar point was taken in respect of the claim by the corporate claimant. Because of this apparent similarity we dealt with the point in each appeal at the same hearing. In the event the arguments advanced in each appeal proved very different. The appeal in relation to the presumption of damage is brought with permission granted by Sedley LJ.

5. The second issue raised by this appeal is whether the claimant has any prospect of proving that the words complained of were written of and concerning him. Dow Jones contends that he has not and advanced this and other grounds in support of an application for summary judgment. The judge ruled in favour of the claimant on this point. Sedley LJ refused permission to appeal against this ruling. In the course of argument we invited Mr Gavin Millar, who appeared on behalf of Dow Jones, to renew the application for permission to appeal. He did so and we granted the application.
6. The other two issues raised on this appeal both arise out of the fact that the publication in this jurisdiction of which complaint is made was minimal. This led Dow Jones to include in their grounds for seeking summary judgment the contentions (1) that the claimant could not demonstrate that a real and substantial tort had been committed in this jurisdiction and (2) that this action was an abuse of process.

The claim

7. On 18 March 2003 Dow Jones posted on the world wide web servers of the *Wall Street Journal On-Line* in New Jersey the article complained of ('the article'). This enabled subscribers around the world, and in England in particular, to draw down the article. According to Dow Jones the article remained on the website until around 22 March 2003, when it was moved into an archive. It remained in the archive until July 2003, when it was removed altogether.
8. The Article began as follows:

“WAR ON TERROR

**List of Early al Qaeda Donors Points to Saudi Elite,
Charities**

By GLENN R. SIMPSON

Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON – A cache of al Qaeda documents seized last year by U.S. agents in Bosnia identifies some of Saudi Arabia's richest and most influential families as among the first financial supporters of Osama bin Laden, and shows how al Qaeda used charitable arms of the Saudi government.

An account of the roots of al Qaeda found on a computer used by a suspected al Qaeda front group contains a 1988 memorandum listing 20 Saudi financial backers of Mr bin Laden – “the Golden Chain,” as the bin Laden organization called it. The list includes the families of three billionaire Saudi

banking magnates, several top industrialists and at least one former government minister.

The Golden Chain list, which doesn't indicate the size of the donations, was drawn up at a time when supporting the Afghan revolt against Soviet invaders – Mr bin Laden's cause at the time – was a top U.S. foreign policy objective, as well as a Saudi national cause with deep patriotic and religious overtones. The list doesn't show any continuing support for al Qaeda after the organization began targeting Americans, but a number of the Saudis on it have been under scrutiny by U.S. officials as to whether they have supported terrorism in recent years."

9. There was a box of text published as part of the article, headed "The Golden Chain", which read as follows:

"See the list of donors originally filed under seal in U.S District Court for the Northern District of Illinois (*United States of America v Enaam Arnout*). The list was seized from the Benevolence International Foundation, an alleged al Qaeda front. According to a court filing, "BIF possessed a handwritten draft list of people referred to within al Qaeda as the "Golden Chain", wealthy donors to mujahdaeen efforts. At the top of the list is a Koranic verse stating 'And spend for God's cause'. The list contains twenty names, and after each name is a parenthetical, likely indicating the person who received the money from the specified donor. "

10. There was a hyperlink which would enable readers of the article to find the so-called list of donors. On that list appeared the words "In the name of God, the most gracious, the most merciful and spend for God's cause (Quraanic verse)", followed by the list. The name which appeared fourth on the list was "Yousif Jameel ... (Baterji)".
11. It is pleaded in the particulars of claim that the words in the Golden Chain list accessible via the hyperlink, in their context, were defamatory of the Claimant and bore the following natural and ordinary or inferential meanings:

"6.1 that the Claimant had been among the first financial supporters of the notorious terrorist Osama bin Laden and al Qaeda;

6.2 that there were reasonable grounds to suspect that the Claimant had continued thereafter to provide financial support to Osama bin Laden and al Qaeda, that he had financially supported such terrorism in recent years, and in particular that he supported those responsible for the September 11 attacks."

12. There was lively debate before us as to the precise circumstances in which the Golden Chain list came into the possession of Dow Jones. There is no need to go into this in detail. It is common ground that the list originated in Bosnia and was made available by a United States prosecuting attorney, pursuant to letters rogatory, to claimants in civil proceedings in Washington brought by 9/11 victims against several hundred defendants, mostly Saudi, who are alleged to have funded terrorists ('the *Burnett* action'). It is the claimant's case that this list should have been used exclusively for the purpose of the civil proceedings but that it was improperly made available to Dow Jones by those acting for the claimants. It is Dow Jones' case that no restrictions were placed upon the use that could be made of the list when it was released to the civil claimants and that the United States authorities were content that the list had been made public.
13. It is the claimant's case that the Golden Chain list was first put into the public domain by Dow Jones. It has since become a very well known document, although we did not understand Mr Price to submit that Dow Jones was responsible for this. There has been placed in evidence in this action a statement by the claimant in an action against Times Newspapers Limited which relates to an article in the Sunday Times on 8 June 2003 which, so it seems, concerned the litigation inspired by the Golden Chain list. It is the claimant's case that, as a result of the Golden Chain list he has become suspected of association with Osama bin Laden and al Qaeda when he has had no connection of any kind with either. On the strength of his name in the Golden Chain list he has been added as a defendant in the *Burnett* action. In these proceedings his objective is not to recover damages but to achieve vindication.
14. The claimant's solicitors wrote a letter before action on 15 April 2003 in moderate terms. They stated:

"We understand that WSJ.com has several thousand subscribers within the English jurisdiction. Our client's reputation in England is of the utmost importance to him. ... provided you agree to remove the Golden Chain list from your web site within 7 days, our client will not seek from you any compensation or the legal costs which he has had to incur in consequence of this matter."
15. Dow Jones declined to act as requested. After further correspondence the Claim Form was issued on 18 July 2003. Permission was obtained to serve this out of the jurisdiction and it was duly served in New York. The Particulars of Claim which were served with it alleged that there were between 5,000 and 10,000 subscribers to the web site in the jurisdiction. Paragraph 5 of the Particulars of Claim included the following:

"The Claimant will (if necessary) invite the inference that a substantial number of readers of the main article as set out above will have followed the said hyperlink and read the page to which it led."

16. Dow Jones made no challenge to English jurisdiction. The Defence, served on 24 November 2003, asserted that the approximate number of subscribers within this jurisdiction was 6,000. The claimant issued an application to strike out four paragraphs of the Defence on 3 February 2004. The success of this application has given rise to the second, third and fourth issues with which we have to deal.
17. On 17 March 2004 Dow Jones' solicitors wrote giving notice that they intended to apply to have the action dismissed on the ground that it had no reasonable prospect of success. They alleged that Dow Jones had been able to ascertain that only four subscribers within the jurisdiction had followed the hyperlink and thereby accessed the Golden Chain list. They were subsequently to accept that they had, by error, overlooked a fifth subscriber. It is their case that there were no more. On grounds of confidentiality Dow Jones have not disclosed the identity of two of the subscribers, but have submitted evidence that neither of these knows of the claimant nor has any recollection of reading the claimant's name. The other three subscribers are Mr Andrew Stephenson, the claimant's solicitor, Mr Edward McCabe, a director of Hartwell PLC, a company with which the claimant has been associated, and Mr Jonathan Edwards, a consultant who has worked for the Abdul Latif Jameel group over the last seventeen years. They are members of the claimant's camp, to put the matter colloquially.
18. The claimant has not been prepared to accept without further factual enquiry that only five subscribers in this jurisdiction accessed the Golden Chain list. Before us Mr Price conceded that, even if there were more subscribers, publication was likely to be slight. The judge recorded that

“Mr Price does not accept that Ms Downey's evidence should be taken at face value or that more evidence will not be available in the light of disclosure and cross-examination. But for present purposes, he is prepared to respond to Mr Millar's arguments on the factual assumptions he wishes to make. He submits that the conclusions which Mr Millar seeks to draw from those factual assumptions are, in any event, fallacious and/or wrong in law.”

The argument before us has also proceeded on the premise that Dow Jones case on the size of publication is correct.

The appeal in relation to the presumption of damage

19. In the *Mohammed Jameel* appeal Mr Robertson submitted that English law should be changed so as to place upon corporations the burden of proving special damage as an essential element in a cause of action for libel. This was necessary to accommodate the requirements of the Human Rights Act 1998 and Article 10 of the European Convention on Human Rights ('the Convention'). He made no submissions about the position of an individual claimant.

20. Mr Millar's submissions were very different. He accepted that where there is a significant media publication of a defamatory article damage to the reputation of the individual defamed can properly be inferred. That, he submitted, was very different to presuming damage as a matter of law. Where no inference of damage could properly be drawn it was an unjustified infringement of freedom of expression to *presume* damage as a matter of law. It was particularly objectionable that, as seemed to be the case on existing authority, the presumption of damage should be irrebuttable. In the present case Dow Jones were in a position to show that the very limited publication that had taken place had caused the claimant no damage. A principle of law which made them liable none the less was contrary to Article 10. When the Human Rights Act came into force on 1 October 2000 the courts became bound by section 6 to bring English law into line with the Convention.
21. Mr Price accepted that the presumption of damage was irrebuttable, although talk of the presumption of damage was somewhat misleading. He submitted that the gist of a claim for defamation was that a publication *tended* to damage the claimant's reputation not that it actually did so. Thus, once it was established that a defamatory publication had been made about an identifiable individual, the tort was made out. There was no need to prove that the publication had in fact damaged the reputation of the claimant in the eyes of anyone. Mr Price submitted that this was a desirable principle of law and one that was not in conflict with Article 10.

English law prior to 1 October 2000

22. In support of his contention that the tort of libel can be established even where the claimant's reputation has not in fact been damaged Mr Price relied first and foremost on *Duke of Brunswick v Harmer* (1849) 14 QB 185. The facts of that case were remarkable. On 19 September 1830 an article was published in the "Weekly Dispatch". The limitation period for libel was then six years. The article defamed the Duke of Brunswick. Seventeen years after its publication an agent of the Duke purchased a back number containing the article from the "Weekly Dispatch"'s office. Another copy was obtained from the British Museum. The Duke sued on those two publications. The defendant contended that the cause of action was time barred, relying on the original publication date. The Court of Queen's Bench held that the delivery of a copy of the newspaper to the plaintiff's agent constituted a separate publication in respect of which suit could be brought. (The law reporters do not indicate what the libel was, and no copy of the offending issue of the *Weekly Dispatch* appears to have survived. The volumes for 1830 in otherwise complete runs in British Library and the Library of Congress are missing. Other libraries have partial runs, but none of them include 1830. The proceedings seem to have had the intended chilling effect.)
23. It is plain that the publications sued on can have caused little or no damage to the Duke's reputation, indeed the facts set out in the short report raise serious doubts as to whether the Duke's agent even read the article. This doubt is accentuated by the following somewhat equivocal passage in the judgment of Coleridge J:

“The defendant, who, on the application of a stranger, delivers to him the writing which libels a third person, publishes the libellous matter to him, though he may have been sent for the purpose of procuring the work by that third person. So far as in him lies, he lowers the reputation of the principal in the mind of the agent, which, although that of an agent, is as capable of being affected by the assertions as if he were a stranger. The act is complete by the delivery: and its legal character is not altered, either by the plaintiff’s procurement or by the subsequent handing over of the writing to him.”

24. We do not think that this decision can stand as authority for more than the proposition that each separate publication gives rise to a separate cause of action. More pertinent is *Shevill v Presse Alliance SA* [1996] AC 959. The relevant plaintiff in that case was a young woman whose home was in Yorkshire and who was defamed by an article in *France Soir*. That newspaper had a circulation of about 200,000 copies in France, but only about 250 in England and Wales, of which perhaps 10 were in Yorkshire. The issue was whether the plaintiff could establish English jurisdiction under Article 5 (3) of the Brussels Convention of 1968 on the ground that, so far as the 250 publications were concerned, this jurisdiction was the “place where the harmful event occurred”. The case was referred to Luxembourg, where the ECJ ruled that a claimant could bring an action for defamation before the courts of each state in which the publication was distributed and the claimant claimed to have suffered damage. The issue then arose as to whether the plaintiff had an arguable claim that the publication had caused her to suffer damage in England and Wales. In giving the judgment of the Court of Appeal, Purchas LJ said this:

“The only idiosyncratic aspect arising from the law in England and Wales is the assumption of damage. I do not recognise this as a jurisdictional point. Whether or not there may be detected a publishee in England who both knew the plaintiff and read and understood the French evening newspaper may well arise in the course of the action and be relevant to the assessment of damages. In my judgment, however, to restrict the exercise of jurisdiction to cases where the existence of such a person is established would not be correct.”

He went on to say that the judgment of Coleridge J in *Brunswick v Harmer* supported this proposition.

25. In the House of Lords Lord Jauncey of Tullichettle, with whom the remainder of the House agreed, approved the following proposition advanced by Mr Eady QC on behalf of the plaintiff:

“Since under English law there is a presumption of damage in libel cases, the plaintiffs did not have to adduce evidence of damage arising from the publication of the article in question”

His Lordship went on to hold at p. 983:

“Where English law presumes the publication of a defamatory statement is harmful to the person defamed without proof of special damage thereof that is sufficient for the application of article 5(3). An award of even nominal damages is recognition of some harm having been suffered by the plaintiff.”

26. In *Berezovsky v Michaels* [2001] 1 WLR 1004 at p. 1012 Lord Steyn, after reviewing the relevant authorities, stated that the distinctive features of the English law of libel included the fact that it was not necessary for the claimant to prove that publication of defamatory words had caused him damage because damage was presumed.
27. *Shevill* and *Berezovsky* sufficiently establish that under English law publication of a defamatory article carries with it a presumption that the person defamed by it has suffered damage, without the need to prove that anyone knowing that person has read the article. What neither case, nor *Brunswick*, establishes is that the presumption is irrebuttable.
28. What if an article defames a person who can plainly be identified by his name or description in the article but the defendant succeeds in proving that no reader of the article knew or knew of that person? In *Multigroup Bulgaria Holding AD v Oxford Analytica Ltd* [2001] EMLR 737 Eady J expressed the view that an article defaming an identifiable individual would give rise to a cause of action even where no one reading the article had prior knowledge of the victim. While we are unaware of any authority that supports this proposition, it seems to us that it makes sound sense. There seems no reason in principle why a newspaper should not simultaneously create and besmirch an individual's reputation. To take an extreme example, imagine that an unknown American who was about to visit an English town was erroneously described in the town's local paper as a paedophile. Manifestly the law ought to afford him a cause of action in libel.
29. It follows that where a statement is published to a reader that is defamatory of an identifiable individual, it will not be possible for the publisher to prove that no damage has been caused to the individual simply by showing that the reader did not know the individual. If this remains good law after 2 October 2000 and if the article identified the claimant as the Yousef Jameel on the Golden Chain list, it follows that the publication of that list to the two unnamed subscribers caused the claimant some, albeit very modest, damage.
30. What of the three subscribers in the claimant's camp? We have no knowledge of their state of mind. What if Dow Jones were able to prove that they thought none the worse of the claimant after reading the article and the list? Would they then have succeeded in rebutting the presumption of damage? We do not believe that English law, prior to 1 October 2000, would so have held. Coleridge J in *Brunswick* came close to covering the point when he spoke of the defendant lowering the reputation of the principal in

the mind of the agent “*so far as in him lies*”. In *Hough v London Express* [1940] 2 KB 507 at p. 515 Lord Goddard CJ said:

“If words are used which impute discreditable conduct to my friend, he has been defamed to me, although I do not believe the imputation and may even know it is untrue”

Lord Morris approved this statement in *Morgan v Oldhams Press Ltd* [1971] 1 WLR 1239 at 1253.

31. There have always been strong pragmatic reasons for proceeding on the premise that a defamatory publication will have caused the victim some damage rather than opening the door to the claimant and the defendant each marshalling witnesses to say that, respectively, they did or did not consider that the article damaged the claimant’s reputation.
32. In summary, our conclusion is that, prior to 1 October 2000, the presumption that a defamatory publication caused some damage to its victim was, in practice, irrebuttable.

Has the Human Rights Act changed the law?

33. Mr Millar relied upon a number of principles well established under Strasbourg jurisprudence in support of the submission that the presumption of damage was incompatible with Article 10. The most pertinent of these were the following:
 - i) Freedom of expression, as protected by Art 10(1), is one of the *essential foundations of a democratic society* (*Handyside v UK* (1976) 1 EHRR 737), accordingly any restriction must be *convincingly established* under Art 10(2), the burden of proof being on the party seeking to justify the interference (*Sunday Times v UK (No 2)* (1991) 14 EHRR 229);
 - ii) Restrictions directed against the media should be particularly closely scrutinised, since the media have a special place in any democratic society as *purveyor of information and public watchdog* (eg *Prager and Oberschlick v Austria* (1995) 21 EHRR 245 (para 34));
 - iii) Where there has been an interference with the Art. 10(1) right, it is not sufficient that *its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms; the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it ...* (*Sunday Times v UK* (1979) 2 EHRR 245, para 65);

- iv) In reviewing the necessity for the interference the Strasbourg Court will ask not only whether the standards applied by the national authorities were in conformity with Art 10 but also whether they *based themselves on unacceptable assessment of the relevant facts ... (Zana v Turkey (1999) 27 EHRR 667, para 51).*
- 34. Mr Millar submitted that the presumption of damage infringed these principles for a number of reasons. He submitted that a necessity to hold a claimant liable in defamation where in fact his publication may have caused no damage cannot be convincingly demonstrated. On the contrary it is an unjustified interference with freedom of expression. The presumption operates against media defendants who are frequently defendants in libel actions and therefore any purported justification must be particularly closely scrutinised. The presumption is calculated to have a chilling effect on freedom of speech as claimants will be able to bring proceedings even though they do not know whether anyone has read the material complained of, or associated it with them. Insofar as it is necessary to provide a claimant who cannot prove damage with vindication in the face of a defamatory publication, English law could and should devise other ways, such as a declaration of falsity. He further submitted that the presumption of damage was likely to result in awards which infringed the principle in *Tolstoy*.
- 35. Mr Price's arguments in favour of the presumption of damage were essentially pragmatic. He submitted that, but for the rule, defamation actions would be even longer and more complex, to the detriment of the media. Witnesses would have to be called to testify as to the meaning that they attached to the words published, instead of leaving it to the jury to determine this. Leaving it to the jury to reflect the extent of the defamation by the size of their award of damages was more flexible and simple than would be requiring the judge to frame a declaration of falsity. The latter would often be totally impracticable.
- 36. Mr Price also made the point that the presumption of damage does not carry with it more than liability to pay a penny damages. There was no justification for the suggestion that it was liable to result in awards which infringed the principle in *Tolstoy*.
- 37. The presumption of damage has long been a principle of the English law of defamation. We are aware that it has received adverse comment in other jurisdictions. In recent times the English law of defamation has received detailed consideration in both the Faulks Report of 1975 and the Neil Report of 1991. The abolition of the presumption of damage has not been recommended. It seems to us that English law has been well served by a principle under which liability turns on the objective question of whether the publication is one which *tends* to injure the claimant's reputation. It would not be right to abandon this principle in the absence of a convincing case that it is in conflict with Article 10 of the Human Rights Convention

38. Mr Millar has admitted that, so far as media publications are concerned, it will be a rare case where the presumption of damage has any significance. Where, as will usually be the case, publication is significant, an inference that the claimant's reputation has been damaged will arise which it is impossible to rebut. The presumption has assumed significance in this case because it has proved possible to identify the five individuals who, on Dow Jones' evidence, are the only ones to whom the article was published in this jurisdiction. The harm done to the claimant's reputation by the publication to these five individuals is minimal. When the claimant commenced this action he had reason to believe that the publication was very much more substantial. Had he known the limited nature of the publication we find it hard to believe that he would have started an action in this jurisdiction. As Mr Price pointed out in argument, libel proceedings are extremely expensive and not lightly undertaken.
39. We believe that circumstances in which a claimant launches defamation proceedings in respect of a limited circulation which has caused his reputation no actual damage will be very rare. We reject the suggestion that the fear of such suits will have a chilling effect on the media. We have not been persuaded that the possibility of such suits calls for the radical change in English law for which the defendant has called. Nor do we accept the broader submission that, because damage does not have to be proved, juries may award damages on a scale which offends against the principle in *Tolstoy*. Judges give juries appropriate directions as to their approach to awarding damages and if such directions are disregarded the Court of Appeal has jurisdiction to intervene.
40. We accept that in the rare case where a claimant brings an action for defamation in circumstances where his reputation has suffered no or minimal actual damage, this may constitute an interference with freedom of expression that is not necessary for the protection of the claimant's reputation. In such circumstances the appropriate remedy for the defendant may well be to challenge the claimant's resort to English jurisdiction or to seek to strike out the action as an abuse of process. We are shortly to consider such an application. An alternative remedy may lie in the application of costs sanctions.
41. For these reasons we are not persuaded that the presumption of damage that forms part of the English law of libel is incompatible with Article 10 of the Convention and that it must, accordingly, be swept away. The appeal in relation to this issue will be dismissed.

Identification of the claimant

42. Before Eady J Mr Millar submitted that the claimant had no real prospect of establishing that readers in England would have understood that the article referred to him. The judge rejected that submission. Before us Mr Millar indicated that he would seek to rely on this submission, not as an independent ground of appeal, but in support of his contentions that no substantial tort had been committed within the jurisdiction

and that the action was an abuse of process. In these circumstances it seemed to us appropriate to grant Mr Millar permission to appeal against the judge's rejection of his contention that it could not be shown that English readers might have understood that the article referred to the claimant.

43. The starting point of Mr Millar's argument was that both Yousif and Jameel were common Muslim names (the first can be transcribed from Arabic as either Yousef or Yousif). This is correct. The claimant made this very point himself, when contending in his action against Times Newspapers Ltd that it did not follow that the Yousif Jameel on the Golden Chain list was himself. Mr Millar further relied upon Dow Jones' evidence that the publication of the Golden Chain list in England was limited to 5 subscribers.

44. In his judgment Eady J cited the statement in paragraph 7.3 in *Gatley* that:

"Where the claimant is expressly identified by name, it is not necessary to produce evidence that anyone to whom the statement was published did identify the claimant"

He went on to hold that:

"The Claimant's name appears in the relevant passage of the words complained of, and that is sufficient for [Mr Price's] purposes."

45. Taken on its own, that finding would not have justified the judge's rejection of Mr Millar's submissions. Where a common name is included in an article, the name itself will not suffice to identify any individual who bears that name. The context in which the name appears, coupled with the name may, however, do so. Reference by the judge to passages from *Hulton v Jones* [1910] AC 20 has satisfied us that the judge attached significance not merely to the publication of the name Yousif Jameel, but to the context in which it appeared. He concluded that the two together would, or might, lead those who knew Mr Jameel to identify him as the Yousif Jameel in the Golden Chain list.
46. We have concluded that the judge was right not to grant Dow Jones summary judgment on the basis that there was no reasonable prospect of proving that the name Yousif Jameel in the Golden Chain list identified the claimant. The article alleged that the list was of Saudi financial backers of Mr bin Laden in 1988. It may well be that the claimant was the only Saudi of that name who, in 1988, was sufficiently wealthy to feature on such a list. Furthermore it appears that the claimant has been widely identified as the Yousif Jameel on that list. This certainly lends support to the proposition that, applying an objective test, the claimant was one of those about whom the article was written.

47. For these reasons Dow Jones' appeal against the judge's ruling on identification is dismissed.

No substantial tort and abuse of process

48. It is convenient to take these two matters together, for they overlap. This action relates to libel in a publication effected by the internet. The article was posted on the web servers in New Jersey. Dow Jones pleaded in their Defence that it was this which constituted publication of the article, so that no publication occurred in England. The judge struck out that plea, holding that it was contrary to decisions which included *Loutchansky v Times Newspapers & Ors Nos 2 to 5* [2002] QB 783 and at page 813 and *Berezovsky*. Sedley LJ gave permission to appeal against this ruling. Mr Millar recognised that this court was likely to feel bound to follow the same authorities that had led to his defeat on this point at first instance and simply reserved his position in relation to it. Internet publication can, however, raise in an acute form the issues that we are now considering.
49. Where there is a worldwide publication of an allegedly defamatory article, whether in hard copy form or on the internet, difficult issues of jurisdiction may occur. Where the claim is governed by the Brussels and Lugano Conventions and the Judgments Regulation (Council Regulation 44/2001 of December 22 2000) a claim for all publications can be brought in the jurisdiction where the defendant is established or individually in each member state where publication has taken place in respect only of the publication within that member state: *Shevill v Presse Alliance* [1995] 2 AC 18. If the latter alternative is adopted, English jurisdiction in respect of the publication in England cannot be challenged on the ground that England is not the most convenient forum. Where the Conventions do not apply, a claimant can obtain permission to serve a foreign publisher out of the jurisdiction in respect of a publication in England, pursuant to CPR 6.20(8). In those circumstances the claim will be limited to the publications within the jurisdiction. Furthermore, the defendant can apply to have service set aside on the ground that there is an alternative jurisdiction "in which the case may be tried more suitably for the interests of all the parties and for the ends of justice": *The Spiliada* [1987] AC 470.
50. It is in the context of an application to set aside service outside the jurisdiction on such grounds that the question of whether 'a real and substantial tort has been committed within the jurisdiction' has been relevant. In *Kroch v Rossell* [1937] 1 All ER 725 the plaintiff brought libel proceedings against the publishers of a French newspaper and a Belgian newspaper. He obtained permission to serve each defendant out of the jurisdiction on the ground that a small number of copies of each newspaper had been published in England. The vast bulk of the publications had been in France and Germany. The defendants applied successfully to have the order giving permission to serve out set aside. Slesser LJ remarked at p. 729:

"in no sense can it be said that there is any substantial importation of these papers in England, or that the libel which

is said to affect the plaintiff in England is anything but a very minor incident of the substantial publication in France.”

Scott LJ added:

“I think that it would be ridiculous and fundamentally wrong to have these two cases tried in this country, on a very small and technical publication, when the real grievance of the plaintiff is a grievance against the widespread publication of the two papers in the respective countries where they are published.”

51. More recently, in *Chadha v Dow Jones & Co Inc* [1999] EMLR 724 at p. 732 Roch LJ stated:

“In my judgment once it is established that there has been an “English tort” that is to say that there has been a significant publication of prima facie defamatory matter concerning the plaintiff within the jurisdiction, the English courts have jurisdiction with regard to that English tort. Where the perpetrator of the tort is not within the jurisdiction but is abroad, then leave to serve process abroad under Order 11 is required and the fundamental principle identified by the House of Lords in *The Spiliada* applies. If there is a substantial complaint with respect to the English tort, having regard to the scale of the publication within the jurisdiction and the extent to which the plaintiff has connections with and a reputation to protect in this country as against the inconvenience to the defendant in being brought here to answer for his alleged wrong-doing then service of the writ abroad is to be ordered.”

52. Mr Millar submitted that these principles applied equally to his application to strike out the claim on the ground that the action was an abuse of process. He submitted that no substantial tort had been committed in this jurisdiction. The publication had been minimal and it had done no significant damage to the claimant’s reputation. In these circumstances pursuing this expensive action was disproportionate and an abuse of process.
53. Mr Price conceded that, had Dow Jones objected to the jurisdiction on the grounds that England was not the appropriate forum he might have been hard pressed to justify exercise of an exorbitant jurisdiction. He contended, however, that by submitting to the jurisdiction Dow Jones had conceded that England was the ‘forum conveniens’ for the claimant’s claim. From the outset, the claimant’s only concern was to achieve vindication in respect of the defamation. English law recognised this as a legitimate reason for bringing a claim for defamation. The claimant had believed that there had been a substantial publication of the article together with the Golden Chain list in England. Dow Jones had not disabused him. It was far too late to take the point that there had been no substantial tort within the jurisdiction. In pursuing the English

proceedings the claimant had acted to his detriment by permitting the possibility of bringing proceedings in an alternative jurisdiction to become time-barred.

54. Mr Price's submissions amount, so it seems to us, to asserting that Dow Jones' failure to challenge English jurisdiction estops them from relying at this stage on arguments that could have been advanced in support of such a challenge. We do not accept this. An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing-field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice. If Dow Jones have caused potential prejudice to the claimant by failing to raise the points now pursued at the proper time, it does not follow that the court must permit this action to continue. The court has other means of dealing with such prejudice. For instance, appropriate costs orders can compensate for legal costs unnecessarily incurred and relief can be made conditional on Dow Jones undertaking not to raise a limitation defence if proceedings are now commenced in another jurisdiction.
55. There have been two recent developments which have rendered the court more ready to entertain a submission that pursuit of a libel action is an abuse of process. The first is the introduction of the new Civil Procedure Rules. Pursuit of the overriding objective requires an approach by the court to litigation that is both more flexible and more pro-active. The second is the coming into effect of the Human Rights Act. Section 6 requires the court, as a public authority, to administer the law in a manner which is compatible with Convention rights, insofar as it is possible to do so. Keeping a proper balance between the Article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged.
56. We do not believe that *Brunswick v Harmer* could today have survived an application to strike out for abuse of process. The Duke himself procured the republication to his agent of an article published many years before for the sole purpose of bringing legal proceedings that would not be met by a plea of limitation. If his agent read the article he is unlikely to have thought the Duke much, if any, the worse for it and, to the extent that he did, the Duke brought this on his own head. He acquired a technical cause of action but we would today condemn the entire exercise as an abuse of process.
57. In *Schellenberg v BBC* [2000] EMLR 296 the claimant had settled defamation actions against the *Guardian* and the *Sunday Times* on disadvantageous terms, when it seemed likely that he was about to lose. He then pressed on with this almost identical action against the BBC. Eady J struck this out as an abuse of process. He rejected the submission that he should not do so as this would deprive the claimant of his 'constitutional right' to trial by jury. He said:

“... I see no reason why such cases require to be subjected to a different pre-trial regime. It is necessary to apply the overriding objective even in those categories of litigation and in particular to have regard to proportionality. Here there are tens of thousands of pounds of costs at stake and several weeks of court time. I must therefore have regard to the possible benefits that might accrue to the claimant as rendering such a significant expenditure potentially worthwhile.”

He added that the overriding objective’s requirement for proportionality meant that he was bound to ask whether “the game is worth the candle”. He concluded:

“I am afraid I cannot accept that there is any realistic prospect of a trial yielding any tangible or legitimate advantage such as to outweigh the disadvantages for the parties in terms of expense, and the wider public in terms of court resources.”

58. In *Wallis v Valentine* [2002] EWCA Civ 1034; [2003] EMLR 8 the Court of Appeal, in a judgment delivered by Sir Murray Stuart-Smith, endorsed Eady J’s approach and dismissed an appeal by the claimant against the striking out of his claim as an abuse of process. That was an extreme case where the judge had found that even if the claimant succeeded his damages would be very modest, perhaps nominal, and not such as could justify the costs of an action which was estimated to last 14 days in circumstances where the claimant had no assets. Furthermore the claimant was not motivated by a desire for vindication, but was pursuing a vendetta.
59. In the present case there is no doubt that the claimant is seeking vindication. His complaint is that the media, including *the Wall Street Journal On-line*, have, without justification, treated the Golden Chain list as if it is a list of those who, in 1988, had contributed to funding Osama Bin Laden and who, in consequence, remained suspected of funding terrorism. Dow Jones had refused to state that the claimant was guilty of neither, or even to publish his own assertion to that effect. Dow Jones for their part do not assert that the claimant had in fact contributed to funding Osama Bin Laden sixteen or more years ago. They are not prepared, however, to publish a statement that he did not do so. They assert that they are entitled, by way of responsible reporting, to publish, without adopting, such comments as are made by the United States authorities in relation to the claimant’s position. Whether that is all that they have done and whether that provides them with a defence of qualified privilege are issues raised in this action.
60. If vindication is the first object advanced by the claimant for pursuing this litigation, the second is to obtain an injunction restraining Dow Jones from repetition of the alleged libel. We must now consider each objective to see whether it justifies the continuance of this action.

Vindication

61. Mr Price accepted that the claimant's cause of action related only to the publications within this jurisdiction, which for purposes of argument are assumed to have been no more than the five individual publications that Dow Jones have identified. Yet the publication was a worldwide publication and at times Mr Price's submissions suggested that it was legitimate to have regard to the vindication that these proceedings would, if successful, bring about in relation to the worldwide publication. If the claimant obtains a favourable verdict from the jury in this action there will be nothing to prevent him from asserting that the verdict provides vindication in respect of the global publication. Two questions arise. First, where there has been a worldwide publication on the internet, can a claimant justify proceeding in a country where publication has been minimal on the ground that this is a good forum in which to seek global vindication? Second, to what extent are the present proceedings likely to result in vindication?
62. *Berezovsky* provides assistance in answering the first question. The plaintiff, a Russian, brought a libel action in respect of an article in the American magazine *Forbes*. 98.9% of the issue in question was sold in the USA, Canada or to US forces. The English circulation was about 2000 copies. The plaintiff obtained permission to serve proceedings out of the jurisdiction. On the application of the defendants the judge set this service aside, on the ground that the appropriate jurisdiction for the dispute was Russia. The defendants gave undertakings that ensured that the claimant would be able to pursue his claim in that jurisdiction.
63. The Court of Appeal reversed that decision [1999] EMLR 278. They held that the judge had erred in principle in approaching his decision as if the global publication was a single tort in respect of which an action could only be brought in a single jurisdiction. Each publication in England had to be treated as a separate tort. Where there was no complaint of substance in relation to that English torts, either because there was an insignificant English circulation, or because the plaintiff had no connection with or reputation to protect in England, or both, permission to serve out should not be given because the *Spiliada* test would not be satisfied. In the instant case the claimant had connections with and a reputation to protect in England and, having regard to the extent of the publication, there was a substantial complaint as regards the English torts. An appeal in respect of a second similar action was heard at the same time and followed the same course.
64. There was a further appeal to the House of Lords. The majority supported the analysis of the Court of Appeal. Lord Hoffmann viewed the matter differently. He said at pp 1023-4:
- “... the notion that Mr Berezovsky, a man of enormous wealth, wants to sue in England in order to secure the most precise determination of the damages appropriate to compensate him for being lowered in the esteem of persons in this country who have heard of him is something which would be taken seriously only by a lawyer. An English award of damages would probably not even be enforceable against the defendants in the United States: see Kyu Ho Youm, “The Interaction Between

American and Foreign Libel Law: U.S. Courts Refuse to Enforce English Libel Judgments” (2000) 49 I.C.L.Q. 131. The common sense of the matter is that he wants the verdict of an English court that he has been acquitted of the allegations in the article, for use wherever in the world his business may take him. He does not want to sue in the United States because he considers that *New York Times v Sullivan* (1964) 376 U.S. 254 makes it too likely that he will lose. He does not want to sue in Russia for the unusual reason that other people might think it was too likely that he would win. He says that success in the Russian courts would not be adequate to vindicate his reputation because it might be attributed to his corrupt influence over the Russian judiciary.”

65. A little later Lord Hoffmann added:

“The plaintiffs are forum shoppers in the most literal sense. They have weighed up the advantages to them of the various jurisdictions that might be available and decided that England is the best place in which to vindicate their international reputations. They want English law, English judicial integrity and the international publicity which would attend success in an English libel action.”

Lord Hoffmann concluded:

“My Lords, I would not deny that in some respects an English court would be admirably suitable for this purpose. But that does not mean that we should always put ourselves forward as the most appropriate forum in which any foreign publisher who has distributed copies in this country, or whose publications have been downloaded here from the Internet, can be required to answer the complaint of any public figure with an international reputation, however little the dispute has to do with England. In *Airbus Industrie G.I.E. v Patel* [1991] 1 AC 119 your Lordships’ House declined the role of “international policeman” in adjudicating upon jurisdictional disputes between foreign countries. Likewise in this case, the judge was in my view entitled to decide that the English court should not be an international libel tribunal for a dispute between foreigners which had no connection with this country.”

66. So far as concerns the issue currently under consideration there is no conflict between the view of Lord Hoffmann and the view of the majority. This action falls to be considered as relating exclusively to an independent tort, or series of torts, in this country. It is thus not legitimate for the claimant to seek to justify the pursuit of these proceedings by praying in aid the effect that they may have in vindicating him in relation to the wider publication.

67. To what extent will this action, if successful, vindicate the claimant's reputation? English law and procedure does not permit the court to make a declaration of falsity at the end of a libel action. Where justification has been pleaded the verdict of the jury will determine whether the defendant has justified the defamation. Where there is no plea of justification, the jury is directed to proceed on the presumption that the defamatory allegation is untrue. The damages that they award will indicate their view of the injustice that has been done to the claimant by the allegation that is presumed to have been untrue. To this extent an award of substantial damages provides vindication to the plaintiff. The presumption of falsity does not however leave the judge in a position to make a declaration to all the world that the allegation was false. In the present case, where the matter will not even be explored at the trial, the judge could not possibly be expected to declare, with confidence, that the claimant never provided funding to Osama bin Laden. There may well in due course be a finding in relation to this in the *Burnett* action, where the question will be directly in issue.
68. What will be in issue at the trial, if it proceeds, has not been explored before us. The judge summarised the position by saying that the Defence included "defences by way of qualified privilege on various bases". We anticipate that these defences are likely to prove cumbersome to try with a jury, involving a lengthy and expensive trial. At the end of the day the trial will determine whether the publications made to the five subscribers were protected by qualified privilege. If they were not, it does not seem to us that the jury can properly be directed to award other than very modest damages indeed. These should reflect the fact that the publications can have done minimal damage to the claimant's reputation. Certainly this will be the case if the three subscribers who were in the claimant's camp prove to have accessed the Golden Chain list in the knowledge of what they would find on it and the other two had never heard of the claimant.
69. If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. The cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick.
70. If we were considering an application to set aside permission to serve these proceedings out of the jurisdiction we would allow that application on the basis that the five publications that had taken place in this jurisdiction did not, individually or collectively, amount to a real and substantial tort. Jurisdiction is no longer in issue, but, subject to the effect of the claim for an injunction that we have yet to consider, we consider for precisely the same reason that it would not be right to permit this action to proceed. It would be an abuse of process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where so little is now seen to be at stake. Normally where a small claim is brought, it will be dealt with by a proportionate small claims procedure. Such a course is not available in an action for defamation where, although the claim is small, the issues are complex and subject to special procedure under the CPR.

71. Mr Price submitted that to dismiss this claim as an abuse of process would infringe Article 6 of the Convention. We do not consider that this Article requires the provision of a fair and public hearing in relation to an alleged infringement of rights when the alleged infringement is shown not to be real or substantial. Subject to the final issue, to which we now turn, and on the premise that there have only been the five individual publications within this jurisdiction, we would dismiss this action as an abuse of process.

The claim for an injunction

72. The claimant's objection to the publication in this case, and in other cases, is not to the reporting of the discovery of the Golden Chain list and the names on it, but to assertions that this list demonstrates that he was an early donor to Al Qaeda and a financial backer of Osama bin Laden and that he has been under scrutiny by the US officials as a possible supporter of terrorism. Mr Price contends that the continuation of these proceedings is justified because of the risk of repetition of these libels and the need to obtain an injunction against such repetition. He accepted that he could only seek an injunction restraining further publications within this jurisdiction, but contended that it is technically possible for Dow Jones to restrict access to matter put on the world wide web so as to exclude from such access those within this jurisdiction.
73. Mr Millar challenged this last contention. He made Dow Jones' position plain:
- “Dow Jones, as major American news organisation, will assert, if I can put it this way, to the last breath of its advocate, its freedom to report both in the US and worldwide two things. First of all, the fact of the existence of a document of major public importance (that is the list; the golden chain list itself) and, secondly, what the US Government has repeatedly said about it in public, having itself, that is the government, put the document into the public domain. I emphasize, we are not talking here, if I can put it that way, about the stray comments of a stray US attorney in the odd case as Mr Price tries to suggest. The golden chain is a key piece of factual history, re the development of international Muslim terrorism, and is referred to repeatedly, as I have said, in, for example, the 9/11 Commission Report. It is therefore now part of the currency of the public debate in the US and, indeed, therefore worldwide surrounding the 9/11 tragedy.”
74. Where a defamatory statement has received insignificant publication in this jurisdiction, but there is a threat or a real risk of wider publication, there may well be justification for pursuing proceedings in order to obtain an injunction against republication of the libel. We are not persuaded that such justification exists in the present case.

75. There seems no likelihood that Dow Jones will repeat their article in the form in which it was originally published. It has been removed from the web site and from the archive. If they do publish further material about the Golden Chain list, it is likely to be by way of reports about litigation in which the list features, or statements made about the list by the US Government or other authorities. It is quite impossible to predict whether any such future publication will be protected by privilege, or calculated to cause significant damage to the claimant's reputation.
76. In these circumstances, if this litigation were to proceed and to culminate in judgment for the claimant, it seems to us unlikely that the court would be able, or prepared, to formulate and impose an injunction against repetition of the defamation in terms that would be of value to the claimant. We do not believe that a desire for this remedy has been what this action has been about, or that the possibility of obtaining an injunction justifies permitting this action to proceed.
77. For these reasons we shall allow this appeal and make an order staying these proceedings.

COURT OF APPEAL FOR ONTARIO
LABROSSE, ABELLA and CRONK JJ.A.

TAB 4

2004 CanLII 15493 (ON CA)

B E T W E E N:)	
)	
EDMOND MURPHY)	R. Donald Rollo,
)	for the respondent (plaintiff)
)	(appellant on cross-appeal)
Plaintiff (Respondent,)	
Appellant on cross-appeal))	
)	
- and -)	
)	
PAM ALEXANDER, STEVEN MORRIS,)	John D. Campbell,
<u>RE/MAX PROFESSIONALS INC.,</u>)	for the appellants (defendants)
<u>FRANK POLZLER and RE/MAX</u>)	(respondents on cross-appeal),
<u>ONTARIO-ATLANTIC CANADA INC.</u>)	RE/MAX Professionals Inc. and
)	RE/MAX Ontario-Atlantic Canada Inc.
)	
Defendants (Appellants,)	
Respondents on cross-)	
appeal))	
)	
)	Heard: September 5, 2003

On appeal from the judgment of Justice John R. Belleghem of the Superior Court of Justice dated December 31, 2001.

CRONK J.A.:

[1] These proceedings arise from the wrongful dismissal and subsequent defamation of a real estate agent by one of the principals of his former employer, a real estate brokerage firm in Ontario.

[2] Three questions require determination by this court. First, where a plaintiff is slandered by the same person on two separate occasions and an action concerning the first slander is statute-barred due to the expiry of a limitation period, is it permissible in assessing damages for the second slander to have regard to the consequences of the first

slander? Second, where a plaintiff prosecutes separate causes of action against two defendants in a single action and is unsuccessful against one defendant but is successful against the other defendant, is it a wrongful exercise of a trial judge's discretion to deny costs to the successful defendant and to require the unsuccessful defendant to pay the plaintiff's entire costs of the litigation? Third, on the facts of this case, did the trial judge err in declining to require reimbursement to the plaintiff of contributions made by him under his employment contract to a group advertising fund?

I. BACKGROUND

(1) The Parties, the Ad Fund and the Events

(a) Parties

[3] In about 1980, Frank Polzler obtained the rights to operate "RE/MAX" real estate brokerage firms in Ontario and Eastern Canada from RE/MAX of America, Inc., subsequently known as RE/MAX International, Inc. ("RE/MAX International"). Polzler's company, RE/MAX Ontario-Atlantic Canada Inc. ("RE/MAX Ontario") granted a RE/MAX franchise to RE/MAX Professionals Inc. ("Professionals"). Various other RE/MAX franchises were created over time, including RE/MAX Supreme Realty Limited ("Supreme"), which was owned by Leo Latini.

[4] Initially, Professionals was owned by Polzler. By 1989, Pam Alexander, Polzler's daughter, and Steven Morris, Professionals' office manager, had acquired ownership of Professionals.

(b) Ad Fund

[5] Under RE/MAX International's business model, RE/MAX offices pooled marketing and advertising costs, subscribed to a common business organization and practices, and marketed their real estate agents to the public as "RE/MAX" agents. Each agent contributed to a group advertising fund established by regional RE/MAX brokerage firms to finance the collective business promotion efforts of participating RE/MAX agents (the "Ad Fund"). In Ontario, the Ad Fund was initially administered by RE/MAX Ontario. Subsequently, RE/MAX Promotions Inc. ("Promotions"), was created to administer the Ad Fund.

[6] In July 1982, RE/MAX International issued a directive ("Directive 801") concerning institutional advertising fund administration. As relevant to these proceedings, Directive 801 detailed those expenditures properly to be made from regional institutional advertising funds and those expenditures which were unauthorized. Such items as recruiting and awards banquet expenses fell within the latter category.

[7] Directive 801 was revised in March 1988 by RE/MAX International. The revised version also provided that expenditures from regional group advertising funds should not be made on such items as recruiting and awards banquets. The revised version also stipulated: "All monies paid into the Regional Group Advertising Fund become the property of the Fund" and "Once paid, there will be no refunds of Regional Group Advertising Fees."

(c) Events

[8] Edmond Murphy was employed by Professionals as a real estate agent from August 1983 until September 1989. His written contract of employment with Professionals, dated December 18, 1986, stated:

The Employee shall pay such regional institutional advertising levy as is from time to time set by [RE/MAX Ontario] to be payable by RE/MAX sales person[s] generally. Such payments will be used only in respect of advertising costs incurred by [RE/MAX Ontario].

During his employment with Professionals, Murphy contributed \$4,875 to the Ad Fund.

[9] Murphy and Morris had a troubled working relationship. At a meeting of Professionals' agents in early September 1989, Murphy and Morris exchanged angry words concerning Professionals' policy for the allocation among agents of "cold calls" from prospective clients. The argument continued after the meeting, shifting to complaints by Murphy regarding the administration of the Ad Fund. Later the same day, Morris informed Murphy that he was to leave Professionals' employ immediately. The next day, Morris met with Murphy and again indicated that Murphy was to leave Professionals. Murphy refused to do so, insisting on the notice period for termination of his employment that he felt was provided for under his employment contract. Ultimately, Morris prevailed and Murphy left the employ of Professionals on September 13, 1989. Murphy claimed that he was wrongfully dismissed. Professionals maintained that he had voluntarily submitted his resignation. Shortly after his departure from Professionals, Murphy began to work as a RE/MAX agent with Supreme.

[10] About six months later, on Friday, March 23, 1990, Murphy went to Professionals' office to speak with Morris because he believed that Professionals was not forwarding his business calls to him at Supreme, resulting in a loss to Murphy of prospective business. Murphy was told that Morris was not in the office. After visiting with various of the agents and staff of Professionals, Murphy left without speaking to Morris.

[11] On the following Monday, March 26, 1990, Morris telephoned Latini at Supreme. According to Latini, Morris was irate. Morris told Latini that Murphy had gone to

Professionals' office with a gun and had threatened people, including Morris. He said that the police had been called. Morris also told Latini that he should get Murphy "out of the system", and that Murphy was "a dangerous man" (collectively, the "March Statements"). Latini promised to investigate the matter.

[12] Latini then arranged for one of Supreme's assistant managers to seek a report from Murphy, with instructions that Murphy provide a copy of the report to RE/MAX Ontario and to the police. Murphy provided the report in the form of a letter to Latini dated March 27, 1990. In his letter, Murphy denied the allegations made by Morris and stated, in part: "I can only infer that the response made by Management at [Professionals] was a premeditated and deliberate attempt to character assassination [*sic*] and to destroy my reputation." Murphy also requested an explanation for Morris' allegations.

[13] Latini accepted Murphy's letter, but warned him that if any future difficulties arose, he would be fired. Although Latini also forwarded a copy of Murphy's letter, containing Murphy's request for an explanation, to Professionals and to RE/MAX Ontario, no response was forthcoming from either company. Nonetheless, Murphy's employment with Supreme continued.

[14] One of Murphy's former co-workers at Professionals later telephoned him to warn him that Professionals had called the police and that he should stay away from Professionals' office. According to Murphy, although he was never contacted by the police, he was required frequently to respond to people in the industry who asked him if he had really gone to Professionals' office with a gun. According to Latini, Murphy became known in the real estate community as "the madman". He was the target of numerous jokes concerning "guns" and "bombs", and rumours flourished concerning his alleged conduct.

[15] In late August 1990, Morris met Latini for lunch at a restaurant to discuss various business matters. No one else was present at the lunch. When the subject of Murphy came up, Morris again told Latini that Murphy "had a gun" and reiterated that Murphy was "a dangerous man". Morris also inquired if Murphy was still working with Latini and said: "We [need] to get him out of the system" (collectively, the "August Statements").

[16] Supreme's business failed in October 1990. Thereafter, Murphy worked for several different RE/MAX brokerage firms in Ontario.

[17] Morris left Professionals in November 1990. Upon his departure, Alexander acquired his interest in the company. Morris subsequently filed an assignment in bankruptcy.

(2) The Litigation

(a) Proceedings Before the Trial Judge

[18] On August 20, 1992, Murphy sued Alexander, Morris, Professionals, RE/MAX Ontario and Polzler, seeking damages as against all of the defendants, save for RE/MAX Ontario, for breach of fiduciary duty, breach of contract, wrongful dismissal, unlawful interference in economic relations and injurious falsehoods, together with pre- and post-judgment interest and costs.

[19] Murphy's claims as against RE/MAX Ontario concerned the administration of the Ad Fund and the propriety of certain expenditures made from it. Murphy asserted that his contributions and those of other RE/MAX agents to the Ad Fund were used for unauthorized purposes. He sought a declaration that RE/MAX Ontario owed him a fiduciary duty, an accounting of all contributions made to and all disbursements made from the Ad Fund for the period January 1, 1983 to September 30, 1989, damages in an amount equivalent to the amount of his own contributions to the Ad Fund that were not spent on advertising, damages for injurious falsehoods, general and punitive damages, pre- and post-judgment interest, and costs.

[20] Murphy's action as against Alexander and Polzler was dismissed in November 1992. Morris did not defend Murphy's action and was noted in default. Murphy's action against the remaining defendants was tried before Bellegem J. of the Superior Court of Justice over 11 days in February and April 2001. Morris did not testify at trial and, hence, did not deny the March and August Statements.

[21] In his reasons for judgment dated December 31, 2001, the trial judge held that:

- (i) Murphy was wrongfully dismissed by Professionals, in breach of his employment contract;
- (ii) the March and August Statements by Morris were defamatory and motivated by malice;
- (iii) Professionals was vicariously liable for Morris' defamation of Murphy;
- (iv) Murphy's cause of action regarding the March Statements was statute-barred by virtue of the expiry of the two year limitation period established under s. 45(1)(i) of the *Limitations Act*, R.S.O. 1990, c. L. 15 (the "Act");

- (v) Murphy's action as against Morris should be stayed because Murphy failed to obtain court authorization permitting him to continue the action against Morris after Morris' bankruptcy; and
- (vi) Murphy was not entitled to an accounting concerning the Ad Fund or to the return of his own contributions to the Ad Fund.

[22] The trial judge awarded Murphy the total amount of \$90,000 as against Professionals on account of damages for defamation, plus the amount of \$15,000, also as against Professionals, on account of damages for wrongful dismissal. Murphy's claims against RE/MAX Ontario were dismissed. By supplementary reasons dated August 29, 2002, the trial judge awarded Murphy pre-judgment interest and his costs of the litigation on a partial indemnity basis as against Professionals, including his costs of prosecuting his unsuccessful claims against RE/MAX Ontario. He declined to award costs in favour of RE/MAX Ontario.

(b) Appeal and Cross-appeal

[23] Professionals and RE/MAX Ontario do not challenge the trial judge's liability findings. Rather, Professionals seeks to vary the trial judgment by restricting the damages awarded for defamation to only those damages flowing solely from the August Statements. As well, both companies seek leave to appeal the costs disposition of the trial judge and, if leave be granted, appeal his costs award, seeking to vary it: (i) by directing that Professionals is not liable to pay any costs incurred by Murphy in advancing his unsuccessful claims against RE/MAX Ontario; and (ii) by awarding RE/MAX Ontario its costs of the action on a partial indemnity scale.

[24] Murphy, in turn, cross-appeals from the trial judge's finding that he is not entitled to reimbursement of his own contributions to the Ad Fund. He does not challenge the trial judge's holding that he is not entitled to a general accounting of the contributions made to and the disbursements made from the Ad Fund.

[25] For the reasons that follow, I would allow the appeal, in part, by setting aside the award of damages for defamation and the associated award of pre-judgment interest, substituting in their stead orders requiring Professionals to pay Murphy general damages for defamation in the sum of \$10,000, together with pre-judgment interest calculated in accordance with the trial judge's pre-judgment interest ruling, varied as necessary to conform with these reasons. I would also grant leave to appeal costs and dismiss the balance of the appeal and the cross-appeal.

II. ISSUES

[26] Professionals and RE/MAX Ontario assert that the trial judge erred:

- (i) in his assessment of damages for defamation, by confusing the damages arising from the March Statements with the damages flowing from the August Statements, thereby awarding damages in respect of the cause of action in defamation that was statute-barred; and
- (ii) in his assessment of costs, by declining to award costs to RE/MAX Ontario and by ordering Professionals to pay Murphy's entire costs of the action.

As well, Murphy asserts in his cross-appeal that the trial judge erred in failing to require reimbursement to him of his personal contributions to the Ad Fund. As the Ad Fund claims are relevant to the trial judge's assessment of costs, I will address the issues in these proceedings in the following order: (1) the assessment of damages for defamation; (2) the Ad Fund claims; and (3) the assessment of costs.

III. ANALYSIS

(1) The Assessment of Damages for Defamation

[27] The trial judge's award of damages to Murphy for defamation consisted of: (i) \$45,000 for special damages concerning ongoing loss of income from 1990 to 1994; (ii) \$30,000 for general damages; and (iii) \$15,000 for aggravated damages. The trial judge declined to award punitive damages.

[28] Professionals argues that in his assessment of these damages, the trial judge confused the damages arising from the March Statements with the damages flowing from the August Statements, thereby improperly awarding compensation for injuries arising from the March Statements notwithstanding that Murphy's claims concerning them were not actionable. I agree that in assessing damages for defamation, the trial judge was obliged to distinguish the damages flowing from the March Statements, in respect of which an action was barred due to the expiry of a limitation period, from the damages flowing from the August Statements, in respect of which the prescription period was not engaged. I also agree that the trial judge failed to draw this distinction in this case and that this failure constitutes reversible error.

[29] An award of general or aggravated damages for defamation is intended to compensate the injured plaintiff for the harm occasioned by the defamatory statement.

General damages in defamation cases are presumed from the fact of the slander or of the publication of the false statement. The law presumes that some damage will flow in the ordinary course from the invasion of the plaintiff's rights: see *Ratcliffe v. Evans*, [1892] 2 Q.B. 524 at 528 (C.A.) and *Hill v. Church of Scientology of Toronto* (1995), 126 D.L.R. (4th) 129 at 176 (S.C.C.). In such cases, general damages are said to be "at large", in the sense that an award of damages may include elements for reputational loss, injured feelings, bad or good conduct by either party, or punishment. In essence, such an award is not limited to the pecuniary loss that has been specifically established: see *Cassell & Co. v. Broome*, [1972] A.C. 1027 at 1071 and 1073 (H.L.), *per* Lord Hailsham. The presumption of damages, however, may be rebutted.

[30] In this case, Latini, Murphy's employer at the time of both the March and the August Statements, testified that the March Statements made him "pretty nervous" and "quite terrified" because he was uncertain of what action Murphy might be capable in the circumstances. He also said that the rumours concerning Murphy were rampant in the real estate community and that the circle of realtors involved with Supreme all knew who the "madman" was after the March 1990 incident.

[31] In connection with the August Statements, Latini testified that he did not repeat the August Statements to anyone else and that they did not cause him to further investigate Murphy's conduct. He also said, however, that to the date of the trial, he was still being asked whether he had "talked to the madman lately".

[32] Murphy testified at trial that he continued to be asked about the alleged gun incident consistently, "even to the present day". However, he made no mention in his testimony of the August Statements or of events flowing therefrom.

[33] Thus, as asserted by Professionals, there was evidence before the trial judge which, if accepted by him, would support the conclusion that most, and arguably all, of the damages sustained by Murphy flowed from the March Statements.

[34] Murphy does not cross-appeal from the trial judge's holding that his claims concerning the March Statements were statute-barred. In addition, Murphy does not dispute that each occasion of slander is a separate delict, giving rise to a separate cause of action and a separate head of damages. Consequently, Murphy is not entitled to recover damages for those injuries and losses arising from the March Statements, although he is entitled to recover damages for defamation in relation to the August Statements.

[35] Given these circumstances, it was incumbent on the trial judge to distinguish between the damages flowing from the August Statements in comparison to the damages flowing from the March Statements, to the extent that the evidence permitted him to do so. Read as a whole, in my view, the trial judge's reasons for judgment indicate that he failed to do so. I reach this conclusion for the following reasons.

[36] The trial judge began his assessment of damages for defamation by stating:

Moving on to damages then, I am satisfied that Murphy's reputation in the real estate community was damaged as a result of the defamation by Morris.

...

I am satisfied it is more likely than not Murphy lost some real estate deals because of his tarnished reputation.

In making those findings, the trial judge made no reference to the fact that Murphy's action concerning the March Statements and, hence, his claim for relief regarding the March 1990 slander, was statute-barred.

[37] The trial judge next considered Murphy's claim for special damages. He observed that it was "difficult, if not impossible" to separate the special damages sustained by Murphy in consequence of "Morris' defamation of him" from the special damages occasioned by Morris' wrongful termination of Murphy's employment. He made no mention, however, of the need to separate the damages sustained by Murphy as a result of the March Statements from those damages arising from the August Statements. As well, in quantifying the special damages to be awarded to Murphy on account of lost income for the years 1990 to 1994, no differentiation was made by the trial judge between the damages attributable to the March Statements and those flowing from the August Statements; nor was an analysis undertaken as to whether, given Latini's evidence at trial regarding the August Statements, the August Statements in fact caused Murphy to lose income in those years.

[38] In addition, no such distinction was drawn by the trial judge in assessing the general and aggravated damages to be awarded to Murphy. To the contrary, the trial judge's reasons indicate that he focused on the August Statements as aggravating the damages occasioned by the March Statements. The trial judge wrote in that regard:

Morris displayed actual malice. He knew the allegations were false or was reckless as to their veracity.

The nature of the words used border on vicious...The fact that Murphy repeated those words demonstrates ongoing hostility and malice towards Murphy.

The use of the words about getting Murphy "out of the system" strikes at the heart of his vocation as a real estate agent. Murphy's reputation in the real estate community as

being “the mad man” testified to by witnesses demonstrates that the story “caught on”. It is impossible to determine how widespread it became. There can be no doubt whatever that Mr. Murphy was personally wounded by this vicious attack by his superior during the ongoing course of trying to “remove him from the (Re/Max) system”. *His former boss continued to press these allegations to those vocationally closest to Murphy, undoubtedly much to Murphy’s chagrin* [emphasis added].

[39] As well, in commenting earlier in his reasons on the August Statements, the trial judge indicated that they were “part and parcel of the ongoing tarnishment of Murphy’s reputation in the real estate community and, as a result, *contributed to the damages sustained by Murphy as a result of this particular defamation* [emphasis added]”. This statement again indicates that the trial judge regarded the August Statements as aggravating the damages sustained by Murphy in consequence of the earlier slander in March 1990.

[40] Murphy argues that in assessing damages for defamation, particularly where, as here, malice is demonstrated, it is permissible to have regard to additional defamatory remarks made by the defendant, both before and after the defamation sued upon, to show surrounding circumstances and a history of animus between the parties. It is true that in assessing damages for defamation, particularly aggravated damages, the court is entitled to consider the entire conduct of the defendant, both before and after an action is commenced, as well as in court during the trial: see for example, *Cassell & Co.*, *supra*, at 1071-72 and *Hill v. Church of Scientology*, *supra*, at paras. 182-83 and 189. Thus, R.E. Brown, in *The Law of Defamation in Canada*, 2d ed. (Toronto: Carswell, 1994) states at 1500: “The reiteration of the defamatory charge at different times and at different places by the defendant may be taken into consideration in fixing the damages.”

[41] In the same text, however, Brown also states at 1501: [W]hile the evidence is admissible in aggravation of damages, *no damages may be directly awarded for any defamatory remarks that are not the subject-matter of the cause of action*” [emphasis added]. Similarly, in *McElroy v. Cowper-Smith*, [1967] S.C.R. 425 at 429, *per* Spence J. dissenting on other grounds, the following passage from *Pearson v. Lemaitre* (1843), 5 Man. & G. 700 at 719-20 is quoted with approval:

And this appears to us to be the correct rule, viz. that either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter; *but that, if the evidence given for the purpose, establishes another cause of*

action, the jury should be cautioned against giving any damages in respect of it [emphasis added].

[42] In this case, no issue arises concerning the admissibility at trial of evidence concerning the March and the August Statements. What is at issue is whether the trial judge's assessment of damages properly ensured that no damages were awarded for the March Statements and granted relief for only those damages attributable to the August Statements. I am unable to conclude on the basis of the trial judge's reasons that the damages assessment here satisfied those requirements.

[43] In my view, read as a whole, the trial judge's reasons indicate that he undertook a global assessment of damages for defamation concerning both the March and the August Statements and that he did not determine the damages arising solely from the August Statements. That approach to the assessment of damages for defamation gave no meaningful effect to the expiry of the applicable limitation period concerning the March Statements.

[44] Accordingly, I would allow the appeal, in part, by setting aside the award of damages for defamation. I agree with Professionals that it is appropriate in this case for this court to fix the damages to which Murphy is entitled as a result of the proven defamation occasioned by the August Statements.

[45] In that connection, Professionals submits that Murphy is entitled to nominal damages only concerning the August Statements. Since Latini testified that he did not repeat the August Statements and that he was alone with Morris when they were made, and because there was no evidence that Murphy was aware of the August Statements, Professionals contends that the presumption of damages arising from the August Statements was rebutted. It argues that on this evidence, the reputational damage that the trial judge found had been suffered by Murphy could not have been caused by the August Statements.

[46] I agree that the evidence of damages arising from the August Statements is weak. Nonetheless, several witnesses at trial indicated that the tarnishing of Murphy's reputation continued to the date of the trial. As well, as I have said, Murphy confirmed that he was still being questioned about the alleged gun incident long after the utterance of the August Statements. Latini testified that he was still being asked at the time of the trial whether he had "talked to the madman lately". Although Latini also said that the August Statements did not cause him to undertake further investigation of Murphy's alleged conduct, he did not indicate that the August Statements had *no* effect on his view of Murphy.

[47] I agree with Professionals that the evidence does not support an award of special or aggravated damages with respect to the August Statements. However, in my view,

there is some evidence in this case to ground an award of general damages. The August Statements were made to Murphy's employer. They cast serious doubt upon Murphy's behaviour and integrity. The trial judge found that they exacerbated the injuries previously caused to Murphy by the earlier, statute-barred slander. Murphy's defamatory actions, for which Professionals is liable, were motivated by malice. Proof of actual damage is not required. On the evidence, the presumption of damages was not fully rebutted. Accordingly, Murphy is entitled to be compensated for the wrong inflicted upon him by the August Statements. In all of the circumstances, I conclude that an award of general damages in the sum of \$10,000 is appropriate in connection with the defamation occasioned by the August Statements.

(2) The Ad Fund Claims

[48] At trial, Murphy argued that the terms of his employment contract with Professionals required that his contributions to the Ad Fund be used only for advertising, that RE/MAX Ontario owed him a fiduciary duty with respect to the Ad Fund, and that his monthly contributions for advertising were held in trust by RE/MAX Ontario. He further argued that the Ad Fund was mismanaged by the expenditure of contributions on activities such as awards dinners and recruiting in contravention of Directive 801. Murphy sought an accounting of all of the contributions made to the Ad Fund by RE/MAX agents and the reimbursement of his own contributions.

[49] In his reasons, the trial judge remarked that "RE/MAX", the organization, kept relatively poor financial records as they related to RE/MAX agents. However, in the end, he held that Murphy did not have status to claim an accounting of all contributions to and expenditures from the Ad Fund. As I have said, Murphy does not challenge that holding.

[50] The trial judge also rejected Murphy's claim for reimbursement of his own contributions to the Ad Fund. In doing so, the trial judge concluded that, in reality, this claim was *de minimus*, for two reasons.

[51] First, the trial judge held that any reimbursement claim concerning most of Murphy's contributions to the Ad Fund was statute-barred. The reimbursement claim was not advanced until August 1994. Accordingly, the claim for reimbursement of contributions made prior to August 1988 was barred by virtue of the expiry of a six year limitation period established under the Act. Murphy does not contest that holding in these proceedings. In addition, as also held by the trial judge, the value of the remainder of Murphy's contributions, that is, those contributions made during the period August 1988 to September 1989, was minimal. The trial judge commented: "[T]he only amount contributed which is not statute-barred would be something less than \$1,000."

[52] Second, Murphy's reimbursement claim concerned only those expenditures from the Ad Fund that were alleged by him to be unrelated to advertising and unauthorized by

Directive 801. As the trial judge noted, when only these expenditures were considered in the context of that part of Murphy's reimbursement claim that was not statute-barred, something less than \$1,000 was in issue.

[53] In view of these factors, the trial judge concluded that Murphy's reimbursement claim was reduced from about \$1,000 to a "relatively insignificant" amount. He also concluded that Murphy had not demonstrated any improper use of the monies in the Ad Fund. There was ample evidence before the trial judge to support those conclusions.

[54] For these reasons, in my view, the trial judge's decision to dismiss Murphy's claim for reimbursement of his contributions to the Ad Fund is unassailable.

(3) The Assessment of Costs

[55] A trial judge has a broad discretion regarding the awarding of costs in civil proceedings. Appellate courts are loathe to interfere with a trial judge's exercise of discretion concerning costs save in very limited circumstances: see *Bell Canada v. Olympia & York Developments Ltd.* (1994), 17 O.R. (3d) 135 at 141-42 (C.A.); *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 at 32; and *Mete v. Guardian Insurance Co. of Canada* (1998), 165 D.L.R. (4th) 457 at paras. 15-16 (Ont. C.A.). Accordingly, absent an error in principle, an appellate court will not interfere with a trial judge's costs disposition even if it concludes that it would have exercised discretion concerning costs in a different way.

[56] In this case, it is useful to observe at the outset that the trial judge's costs disposition constituted neither a "Bullock" order, nor a "Sanderson" order. These types of costs orders are described by M.M. Orkin in *The Law of Costs*, 2d ed. (Aurora: Canada Law Book Inc., 2003) at 2-77 as follows:

Where a plaintiff recovers judgment against one of several defendants and the action is dismissed against the others, in the normal course the plaintiff will be entitled to costs against the unsuccessful defendant, and the successful defendant will be entitled to costs against the plaintiff. However, where the allocation of responsibility between defendants is uncertain, usually because of interwoven facts, it is often reasonable for a plaintiff to proceed through trial in order to establish liability. In this situation the courts have devised two alternatives known respectively as a Bullock order and a Sanderson order. Simply put, a Bullock order directs an unsuccessful defendant to reimburse the plaintiff for the costs of the successful defendant; a Sanderson order directs that the payment go directly to the successful defendant.

[57] Thus, under both a Bullock and a Sanderson order, a successful defendant recovers its costs and the issue for determination by the court concerns which party, as between the plaintiff and the unsuccessful defendant, should bear responsibility for the payment of those costs. That is not this case. Here, the successful defendant was denied its costs and the unsuccessful defendant was obliged to pay the plaintiff's costs of proceeding both as against it and as against the successful defendant. In my view, for the reasons that follow, there is no basis upon which to interfere with this costs disposition.

(a) Denial of Costs to RE/MAX Ontario

[58] The trial judge rejected RE/MAX Ontario's claim for its costs of the action, notwithstanding its success at trial, on three grounds. First, in his view, both prior to and during the trial, RE/MAX Ontario and Professionals improperly resisted their documentary production obligations relating to the Ad Fund. Second, RE/MAX Ontario and Professionals were represented throughout the litigation by the same legal counsel. Third, the interests of RE/MAX Ontario and Professionals in the litigation were similar and interwoven such that they should not be entitled to separate costs considerations.

[59] The general costs recovery rule, namely, that costs follow the event, supports RE/MAX Ontario's claim for its costs of the action. However, this is not an absolute rule; nor is success in an action the only relevant factor to be considered in determining an appropriate and just costs disposition.

[60] The trial judge based his denial of costs to RE/MAX Ontario, in part, on its conduct in the litigation. That is a relevant consideration in the decision whether to award or deny costs and in deciding an appropriate quantum of costs if they are to be awarded: see for example, rule 57.01(1)(e) of the *Rules of Civil Procedure*.

[61] The trial judge concluded that RE/MAX Ontario and Professionals failed to make timely disclosure of documents relevant to the determination of the issues concerning the Ad Fund. In his ruling on costs, he said:

More importantly, however, is the fact that much of the pretrial proceedings related to the "ad fund" issue. In fact, *the efforts taken by the defendants to resist producing documentation relating to the use of the ad fund continued even throughout the trial. It was not until late in the trial that much of the evidence that could have been, and ought to have been produced far earlier was eventually produced.* The evidence in this regard was characterized by plaintiff's counsel as an "ambush" by the defendant [RE/MAX] Ontario. He points out that [RE/MAX] Ontario had steadfastly resisted

making efforts to obtain the material that the plaintiff was requesting in order to prosecute his “ad fund” complaint [underlined emphasis in original; other emphasis added].

[62] Although RE/MAX Ontario asserts that it was relieved from any obligation to produce much of this documentation under various pre-trial court orders, it does not dispute that a letter dated January 31, 2001 from RE/MAX International to RE/MAX Ontario was not produced to Murphy or his counsel until six days before trial. This letter dealt with the administration of the Ad Fund, the application of Directive 801 to RE/MAX Ontario and the propriety of certain expenditures from the Ad Fund, including expenditures to subsidize Ontario awards dinners for agents.

[63] Thus, the January 31, 2001 letter was directly relevant to several of the claims advanced by Murphy concerning the Ad Fund. Moreover, on its face, the letter appeared to contradict a written statement made by RE/MAX International in an earlier letter to Murphy dated November 23, 1994 in which the author of the letter stated on behalf of RE/MAX International: “[W]e have no knowledge or information regarding how RE/MAX Ontario expended its ad fund money.” For these reasons, the letter was potentially a key document at trial.

[64] The January 31, 2001 letter was tendered as an exhibit at trial by counsel for RE/MAX Ontario and Professionals when he was cross-examining Murphy. Although it was not tendered for the proof of the truth of its contents, it was relied upon by RE/MAX Ontario and Professionals on the issue of Murphy’s knowledge of RE/MAX International’s position concerning expenditures from the Ad Fund. The author of the letter was not called as a witness at trial.

[65] In his ruling on costs, the trial judge stated in connection with the January 31, 2001 letter:

It is true that the “ad fund” issue turned out, in my judgment, to be a “red herring”. It is also true that as the plaintiff’s counsel argues in his factum:

...were it not for the defendants’ campaign of attrition on the “ad fund” issue, culminating in the ambush shortly before trial in the form of the [January 31, 2001] letter, Mr. Murphy may have been able to reassess his position many years ago.

....

They both demonstrated resistance to producing material required under the *Rules of Practice*.

[66] These comments weighed heavily in the trial judge's reasoning for his costs disposition concerning both RE/MAX Ontario and Professionals.

[67] In connection with RE/MAX Ontario, it was clearly open to the trial judge to conclude that the late disclosure of the information contained in the January 31, 2001 letter evidenced an unwillingness or failure by RE/MAX Ontario to disclose information on a timely basis that may have clarified the issues in dispute regarding the Ad Fund at an earlier stage of the litigation.

[68] In addition, the pre-trial history of this action is characterized by numerous productions and refusals motions. The record indicates that Murphy repeatedly attempted to obtain production of information and documents concerning the Ad Fund issues from RE/MAX Ontario and, in some instances, from Professionals. While I accept RE/MAX Ontario's assertion that it was relieved by some pre-trial court orders from the obligation to produce many of the documents or information sought by Murphy, several pre-trial orders required it to produce documents, or to answer questions asked of it, concerning the Ad Fund. During the course of the trial, RE/MAX Ontario and Professionals produced various working papers of PriceWaterhouse through a witness from that firm. Murphy alleged, and in my view the trial judge implicitly accepted, that these materials included at least some documents concerning the Ad Fund that should have been produced prior to trial.

[69] Thus, the facts found by the trial judge concerning RE/MAX Ontario's conduct in the action support his decision to deny RE/MAX Ontario its costs of the litigation notwithstanding its success at trial and the normal costs recovery rule. There was evidence to support those factual findings. Consequently, I am not persuaded that there is any basis for interfering with the trial judge's exercise of discretion in denying costs to RE/MAX Ontario. As I will discuss next, I reach a similar conclusion concerning the scope of the costs award made by the trial judge against Professionals.

(b) Scope of the Costs Award Against Professionals

[70] Professionals argues that it is fundamentally unjust for it to be held liable for Murphy's costs incurred in unsuccessfully suing RE/MAX Ontario. In addition to his comments concerning Professionals' compliance with its documentary production obligations, which I have earlier reproduced, in his costs ruling the trial judge stated as follows regarding Professionals:

The secondary issue, that is whether there should be a discount in the plaintiff's costs against [Professionals], on the

basis that the bulk of the trial time (and for that matter a very large portion of the pre-trial litigation [and] preparation), related to the “ad fund” issue, is more readily disposed of. Even the defendants concede that a “distributive” approach to costs is inappropriate and forms the basis of its claim of costs on behalf of RE/MAX Ontario against the plaintiff.

Utilizing the same principle, I am satisfied that there was sufficient overlapping of the interests and evidence of all of the defendants, that not only should the plaintiff not be required to pay the costs of the “successful” defendant RE/MAX Ontario, but he should not be deprived of his costs against the unsuccessful defendants, [Professionals] and Morris.

[71] As well, earlier in his costs ruling, the trial judge observed: “[B]oth companies were either owned or substantially controlled by the co-defendants Alexander and Polzler. Mr. Polzler is Ms. Alexander’s father. It was very much in the interest of both corporate defendants to resist all aspects of the plaintiff’s claims. This could effectively be done through one solicitor. They should not be entitled to two separate costs considerations.”

[72] The trial judge appears to have regarded the proposition that Professionals not be held liable for Murphy’s costs of prosecuting his claims against RE/MAX Ontario as an invitation to make a distributive costs order. Under that approach to the allocation of costs, the major issues at trial are identified and the party who is successful on each issue is awarded costs for the time and expense attributable to that issue. In *Armak Chemicals Ltd. v. Canadian National Railway Co.* (1991), 5 O.R. (3d) 1 (C.A.), leave to appeal to S.C.C. refused [1992] 1 S.C.R. vi, this court generally rejected the appropriateness of distributive cost orders in litigation involving multiple issues where success is divided, on the basis that such orders are inconsistent with the rules of procedure concerning offers to settle. Although the possibility of a distributive costs order is not completely foreclosed in a proper case, such an order will be appropriate only in rare circumstances, if at all: *Skye v. Matthews*, [1996] O.J. No. 44 at paras. 15 and 19 (C.A.).

[73] In my view, the allocation of costs in this case is not controlled by the principles applicable to distributive costs orders. The relevant costs issue here does not concern multiple issues between the same parties, where success is divided. Rather, it involves the costs associated with unsuccessfully prosecuting a cause of action against one defendant in the same action in which separate and distinct causes of action are successfully prosecuted against another defendant.

[74] Nonetheless, on the facts here, I am not persuaded that the trial judge's costs disposition against Professionals was a wrongful exercise of discretion.

[75] Murphy's claims concerning the Ad Fund, as framed by him in his amended, amended statement of claim, implicated both RE/MAX Ontario and Professionals. For example, he alleged that Professionals breached its written employment contract with him in respect of the Ad Fund. Murphy's pleading, therefore, triggered Professionals' production obligations under the *Rules of Civil Procedure* concerning the Ad Fund. In addition, as I have previously indicated, several of the pre-trial productions motions concerned Professionals' obligations in respect of both the Ad Fund and other issues. The trial judge concluded on the evidence, as he was entitled to do, that Professionals did not satisfy its production obligations in a timely fashion. Accordingly, Professionals' own conduct in the litigation grounded the costs award made against it.

[76] As well, I do not agree with Professionals' assertion that the trial judge erred in taking into account the relationship between the principals of Professionals and RE/MAX Ontario when arriving at his costs disposition. The interests of both companies were similar in the litigation at least with respect to the Ad Fund. They co-operated in their defences to Murphy's claims including, in particular, in their response to the Ad Fund issues, and they were represented throughout the litigation by the same counsel. These factors are legitimate considerations in assessing the scope of the costs award to be made against Professionals.

[77] It is important to remember that this trial lasted 11 days and that in his costs ruling, the trial judge expressly indicated that Murphy's claims concerning the Ad Fund occupied more than 50% of the time expended at trial and "a very large portion of the pre-trial litigation [and] preparation". Both the length of the trial and the costs of the litigation, therefore, were driven in significant measure by the Ad Fund issues – the very issues in respect of which the trial judge held that both Professionals and RE/MAX Ontario had not fully met their obligations under the *Rules of Civil Procedure*.

[78] I conclude, therefore, that there is no basis upon which to interfere with the trial judge's discretionary decision to hold Professionals responsible for Murphy's litigation costs incurred in prosecuting his claims against RE/MAX Ontario.

IV. DISPOSITION

[79] For the reasons given, I would allow the appeal, in part, by setting aside paragraph one of the trial judgment and substituting in its stead an order requiring Professionals to pay Murphy the total sum of \$25,000 for damages, comprised of \$15,000 on account of the damages awarded by the trial judge for Murphy's wrongful dismissal and the additional sum of \$10,000 as damages for defamation occasioned by the August State-

ments. I would also set aside paragraph two of the trial judgment, which concerns pre-judgment interest, and substitute in its stead an order directing that Professionals pay Murphy pre-judgment interest calculated in accordance with the trial judge's pre-judgment interest ruling, varied as necessary to conform with these reasons. Finally, I would grant leave to appeal costs and dismiss the balance of the appeal and the cross appeal.

[80] Professionals sought leave of this court to make further submissions on other aspects of the costs of the trial if it was successful on its challenge of the trial judge's assessment of damages for defamation. As I have concluded that the appeal should be allowed on the issue of the damages assessment, Professionals, if so advised, may deliver its additional written submissions concerning the costs of the trial to the Registrar of this court within 10 days from the date hereof. Murphy shall deliver his written responding submissions, if any, to the Registrar within 10 days from the date of his receipt of Professionals' submissions.

[81] Viewed as a whole, success in these proceedings has been divided. Accordingly, this is not an appropriate case for an award of costs with respect to the appeal or the cross-appeal.

RELEASED:

"FEB 27 2004"

"E.A.Cronk J.A."

"EAC"

"I agree J.M. Labrosse J.A."

"I agree R.S. Abella J.A."

Case No: CHANI 1999/0272/B3 CHANI 1999/0686/A3
QBCMI1999/0718/A3 CHANF1999/0784/B3

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE

TAB 5

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday, 9th February 2000

Before:

LORD JUSTICE MORRITT
LORD JUSTICE MAY
and
MR JUSTICE WALL

STOCZNIA GDANSKA SA
- and -
LATREEFERS INC

Applicant
Respondent

and other actions

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 180 Fleet Street
London EC4A 2HD
Tel No: 0171 421 4040, Fax No: 0171 831 8838
Official Shorthand Writers to the Court)

Mr A.Glennie QC and Mr M. Pascoe (instructed by Lawrence Graham for Latreefers Inc.)
appeared on behalf of the Applicant.

Mr G.Moss QC and Miss S. Prevezer (instructed by Ince & Co for Stocznia Gdanska SA)
appeared on behalf of the Respondent.

Judgment
As Approved by the Court

JUDGMENT

LORD JUSTICE MORRITT:

This is the judgment of the court to which all members have made substantial contributions.

Introduction

1. In these appeals from the orders of Lloyd J made on 21st December 1998 and 27th May 1999 and from the order of Toulson J made on 10th June 1999 we are concerned with three questions:

(1) whether Lloyd J should have ordered the compulsory winding up of Latreefers Inc (“Latreefers”), a company incorporated in the Republic of Liberia;

(2) whether an Agreement dated 12th October 1994 (“the Funding Agreement”) between Stocznia Gdanska SA (“the Yard”) and a third party (“the Funders”) for the payment by the latter of the costs incurred by the former in the prosecution of the petition to wind up Latreefers and related proceedings in the Commercial Court to which Latreefers and its ultimate holding company Latvian Shipping Company (“Latco”) are parties was and is champertous and, if so, whether the winding up petition and Commercial Court action should have been stayed by Lloyd J and Toulson J respectively;

(3) whether Lloyd J was entitled, pursuant to s.51 Supreme Court Act 1981, to order Latco to pay the costs incurred by the Yard in the prosecution of the petition to wind up Latreefers in so far as they were increased by the opposition of Latreefers.

2. Latco is a corporation established under the laws of the Republic of Latvia and is concerned with shipping. In 1992 Latco was engaged in negotiations with the Yard for the design, building, completion and delivery of six refrigerated vessels. The final negotiations took place in London. It was envisaged that each vessel would be the subject of an individual contract and that each contract would be made with a subsidiary of Latco and contain an English choice of law clause. Latco had a wholly owned subsidiary incorporated in Liberia called Latmar Holdings Corporation (“Latmar”). Latco and Latmar

procured the incorporation in Liberia of Latreefers on 9th September 1992 for the purpose of entering into the six contracts with the Yard.

3. The issued share capital of Latreefers was 100 bearer shares of no par value. They have at all times been held by Latmar. Latreefers had three duly appointed directors, residents in the Isle of Man and associated with Capco Trust IoM Ltd, a company concerned in the formation and administration of offshore companies, namely Mr Hobson, Ms Potts and Mr Brickel. From time to time those directors appointed persons to act as attorneys for Latreefers for specific purposes. Such attorneys included partners or employees in Watson Farley & Williams, a firm of solicitors practising in London, officers or employees of Latmar Services Ltd, a company incorporated in England with offices in London and Mr Henriksen, a Norwegian ship broker operating through a Bermuda service company but with offices in England.

4. The contracts for the six vessels were entered into by the Yard and Latreefers on 11th September 1992. The total price was US\$170m payable by Latreefers by instalments. The first payment of 5% was duly made in respect of vessels 1 to 3 in the sum of US\$4.145m on 19th October 1992. Latreefers has made no further payments in regard to those vessels. The contracts for vessels 4 to 6 were conditional on Latreefers deciding to continue them. Latreefers so decided on 11th January 1993. Shortly thereafter, on 1st February 1993, Latreefers opened a US\$ account with Hambros Bank in London. The first payment of 5% in respect of vessels 4 to 6 was made out of that account in the sum of US\$4.325m on 4th March 1993. Latreefers has made no further payment in respect of those vessels either. The account of Latreefers with Hambros remained active until 30th November 1993. On the latter date there was a credit balance of US\$13.4m which was deposited by Latreefers with CFM.

5. The evidence before us includes documents which suggest that on 2nd December 1993 Latreefers (a) acknowledged a loan from Latco of US\$ 13.4m as of 30th November 1993, (b) repaid the same by assigning to Latco the benefit of Latreefers deposit with CFM and (c) lent US\$218,132 to an associated company Tangent. On the following day a representative of Latreefers told a representative of the Yard that Latreefers could not pay for any of the vessels.

6. On 7th January 1994 the Yard issued proceedings in the Commercial Court against Latco, Latreefers, Mr Henriksen and CFM seeking payment of the further sums due under each of the six contracts, damages for their breach and damages for and injunctions to restrain procurement of such breaches of contract. On 5th December 1994 the Yard obtained summary judgment against Latreefers for US\$11m. in respect of the second instalment due for the first and second vessels. Appeals on this and other issues between the parties were finally determined by the House of Lords on 26th February 1998. The position thereby established is, so far as relevant to the issues before us, that (1) the Yard has an indisputable judgment against Latreefers for US\$11m. and interest thereon in respect of the second instalment due for vessels 1 and 2; (2) the Yard's claim for damages for breach of contract in respect of vessels 1 and 2 is subject to an express obligation to mitigate its loss and bring sums into account under Article 5.05 which Latreefers say, if established, would exceed the claim of the Yard and (3) in respect of vessels 3 to 6 Latreefers claim for the return of the initial payments of 5% on the basis of a total failure of consideration remains to be tried as does the Yard's claim for damages for repudiatory breach.

7. As we have already mentioned on 14th October 1994 the Yard entered into the Funding Agreement now alleged to be champertous. The need for such an agreement was underlined when on 8th August 1996 the Yard was declared to be bankrupt in Poland.

8. The petition with which we are concerned was presented to the Companies Court on 1st July 1998. It is based on the unpaid judgment debt of US\$11m with interest thereon amounting, in all, to US\$15.8m. In paragraph 5 it is averred that sufficient connection with this jurisdiction is to be found in the facts that the six contracts which constituted the only business of Latreefers were entered into in England and contained English choice of law clauses, the appointment as attorneys for Latreefers of eight persons resident in England and the operation of Latreefers' account with Hambros. In paragraph 10 it was averred that an order to wind up Latreefers would benefit the Yard as a creditor of Latreefers in enabling a liquidator to pursue claims available to Latreefers, to investigate its affairs and collect and realise its assets for the benefit of its creditors. The Yard expressly submitted to the jurisdiction of this court in respect of the winding up of Latreefers. In addition in paragraph 11 it was alleged that there is no more appropriate forum in which to wind up Latreefers.

9. The petition came before Lloyd J on 9th and 10th December 1998. Before Lloyd J gave judgment on 21st December 1998 Latreefers' solicitors had received an anonymous telephone call informing them of the existence of the Funding Agreement of which they had been previously unaware. Though, in due course, a full copy was put before the court the Yard is concerned at what appears to them to be a breach of confidence and have invited us to preserve their alleged right to confidentiality so far as we can. We will explain its terms, without identifying the Funders, at the later stage of this judgment when we come to deal with the issue of champerty.

10. In his judgment given on 21st December 1998 Lloyd J decided that he had jurisdiction to entertain the petition to wind up Latreefers. He considered that the position was not entirely clear and thought it better, rather than wind up Latreefers then and there, to appoint provisional liquidators under s.135 Insolvency Act 1986 and adjourn the petition. He required the provisional liquidators to investigate and obtain advice on possible claims of Latreefers against its former directors, including de facto and shadow directors and on the merits of its defence and counterclaim in the Commercial Court proceedings.

11. On 10th February 1999 the defendants to the Commercial Court proceedings, including Latreefers and Latco, applied for an order staying those proceedings and the execution of all judgments therein obtained by the Yard on the grounds that the Funding Agreement was champertous. In the alternative they sought an order for the disclosure of all documents relating to the Funding Agreement. This is the application which, in due course, came before Toulson J.

12. On 9th April 1999 the provisional liquidators appointed by Lloyd J on 21st December 1998 made their report to the court. They reported that the assets of Latreefers within the jurisdiction appeared to include US\$363 in the Hambros Account and US\$218,132 lent by Latreefers to Tangent. They concluded, amongst other things, that Latreefers was insolvent, Latreefers had potential misfeasance, wrongful and fraudulent trading claims against its de jure, de facto and shadow directors, all of which required further investigation and that a winding up order would be in the best interests of the general body of unsecured creditors.

13. The restored hearing of the winding up petition commenced before Lloyd J on 22nd April 1999. On that day Latreefers applied for a stay of the petition on the ground that its

prosecution was being maintained by the Funders pursuant to the Funding Agreement it alleged to be champertous. Lloyd J dismissed this and other objections to making the winding up order sought for the reasons given in his judgement handed down on 27th May 1999. He then heard an application of the Yard, to which he acceded, that he should exercise the jurisdiction conferred by s.51 Supreme Court Act 1981 and order Latco to pay the costs of the Yard in relation to the petition insofar as they had been increased by the opposition of Latreefers.

14. The application of the defendants in the Commercial Court proceedings to which we have referred in paragraph 11 above came before Toulson J. By then CFM and Latreefers had ceased to be applicants with the consequence that the claim for a stay on the execution of judgments obtained by the Yard could not be maintained. On 10th June 1999 Toulson J dismissed the remainder of the application.

15. Also on 10th June 1999 Latreefers, acting by its liquidators, instituted proceedings against Tangent for the recovery of the sum of US\$218,132 to which the provisional liquidators had referred in their report. On 11th November 1999 Latreefers, acting by its liquidators, and the liquidators in their own name instituted proceedings against 14 defendants claimed to be de jure, de facto or shadow directors of Latreefers. The relief sought is damages for breach of fiduciary, contractual or tortious duty and declarations pursuant to ss. 212 to 214 Insolvency Act 1986 arising out of the conclusion, performance or non-performance of the six contracts, the dealings with the deposits in the name of Latreefers with CFM and the payment by Latreefers to Tangent of US\$218,132 on or about 3rd December 1993.

16. The claim of Latreefers against Tangent for repayment of the debt of US\$218,132 came before Langley J on 14th January 2000. At the conclusion of that hearing he dismissed the claim for reasons to be given later. We have been provided, with the consent of Langley J, with a draft of his judgment. The reason for dismissing the claim is, in short, that the debt was repaid when, in January 1994 Tangent paid a larger sum to a creditor of Latreefers and all three parties agreed that it should be treated as repayment of the debt of Tangent to Latreefers. Thus, subject to any appeal for which permission would be required, it is now established that one of the assets of Latreefers, to which the provisional liquidators referred in their report, did

not exist at the time the winding up petition was presented. The proceedings instituted by the liquidators against the directors to which we have referred continue.

The winding up of Latreefers

17. The appeal of Latreefers against the orders of Lloyd J made on 21st December 1998 and 27th May 1999 concerns his decision, underlying the first order, that he had jurisdiction to entertain the winding up petition and, in making the second, that it was a proper case in which to make a winding-up order. There is no appeal against the appointment of the provisional liquidators as such.

18. Part V Insolvency Act 1986 deals with the winding up of unregistered companies. It is not disputed that Latreefers was and is an unregistered company within the definition contained in s.220. S.221, headed Winding up of unregistered companies provides, so far as relevant,

“(1) Subject to the provisions of this Part, any unregistered company may be wound up under this Act; and all the provisions of this Act and the Companies Act about winding up apply to an unregistered company...;

[(2) – (4)]

(5) The circumstances in which an unregistered company may be wound up are as follows –

- (a) if the company is dissolved or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;
- (b) if the company is unable to pay its debts;
- (c) if the court is of opinion that it is just and equitable that the company should be wound up.”

S.225 provides that an overseas company which has been carrying on business in Great Britain but has ceased to do so may be wound up notwithstanding that it has been dissolved under the law of the place of its incorporation. S.229 provides that the provisions of that part with respect to unregistered companies are in addition to, not restrictive of, the provisions in Part IV with respect to the winding up of companies incorporated in England and Wales

“and the court or liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies formed and registered under the Companies Act.”

19. Thus both s.221(1) and s.229 apply to unregistered companies the statutory provisions governing the winding up of companies registered under the Companies Act. Amongst those provisions are a number to which we should draw attention. S.125(1) provides that the

court shall not refuse to make a winding up order on the ground only that the company's assets have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets. S.143 provides that it is the function of the liquidator to get in the assets of the company, distribute them *pari passu* amongst the general body of creditors and to pay the surplus to the persons entitled to it. S.212 provides a summary remedy against, amongst others, an officer of the company or one who has taken part in the management of the company who has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of fiduciary or other duty in relation to the company. By s.213 the court is empowered on the application of the liquidator to declare persons who have been knowingly party to fraudulent trading by the company to be liable to contribute to the assets of the company to such extent as the court thinks fit. S.214 contains a similar power in respect of a director, including a shadow director, where the company has gone into insolvent liquidation and that director knew or ought to have concluded before the commencement of the winding up that there was no reasonable prospect of avoiding it.

20. In his first judgment Lloyd J dealt with the question of jurisdiction to wind up a foreign company as a necessary pre-condition for a power to appoint provisional liquidators under s.135. We are not now concerned with the appointment of the provisional liquidators. But in his second judgment Lloyd J applied his earlier decision on jurisdiction to determine whether he had the power to order Latreefers to be wound up. In respect of that jurisdiction Lloyd J observed that the power conferred by s.221 is in entirely general terms. He pointed out that in the decided cases the courts have laid down constraints as regards the circumstances in which the jurisdiction will be exercised and quoted from the judgment of Sir Raymond Evershed MR in Banque des Marchand de Moscou (Koupetschesky) v Kindersley [1951] Ch. 112 at page 125

“As a matter of general principle, our courts would not assume and Parliament should not be taken to have intended to confer jurisdiction over matters which naturally and properly lie within the competence of the courts of other countries. There must be assets here to administer and persons subject, or at least submitting, to the jurisdiction who are concerned or interested in the proper distribution of the assets. And when these conditions are present, the exercise of the jurisdiction remains discretionary.”

Lloyd J continued

“The formulation of these principles has changed over time, and in particular the presence of assets in the jurisdiction is no longer regarded as essential.

Mr. Pascoe for Latreefers reserves for argument in a higher court the question whether the principles as laid down in recent first instance authority are correct, but he does not invite me to depart from them.

As a result of the decisions of Megarry J in Re Compania Merabello San Nicolas SA [1972] 3 All ER 448, [1973] Ch 75, Nourse J. In Re Eloc Electro-Optiek and Communicatie BV [1981] 2 All ER 111, [1982] Ch 43 and Peter Gibson J. In Re A Company (No 00359 of 1987) Ch 210 (also known, less enigmatically, as International Westminster Bank plc v Okeanos Maritime Corp [1987] BCLC 450, [1987] 2 All ER 137, and to which I will refer as the Okeanos case) the statement of the relevant principles has evolved to the point at which they were summarised, most recently, by Knox J in Real Estate Development Co [1991] BCLC 210 at 217, as consisting of three core requirements, as follows:

- (1) There must be a sufficient connection with England and Wales which may, but does not necessarily have to, consist of assets within the jurisdiction.
- (2) There must be a reasonable possibility, if a winding-up order is made, of benefit to those applying for the winding-up order.
- (3) One or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise a jurisdiction.”

21. Latreefers first submission, as foreshadowed in that passage, is that the judge was wrong to consider that the principles have changed. It is submitted that it is still a necessary requirement for the existence of the jurisdiction to wind up a foreign company that the company has an asset or assets within the jurisdiction sufficient to provide a reasonable possibility of benefit to the creditors as a whole or to the petitioning creditor alone. We are invited to hold that the decisions of Nourse J in Re Eloc Electro-Optiek and Communicatie B.V. [1982] Ch. 43 and of Peter Gibson J in Re A Company (“Okeanos”) [1988] Ch. 210 are wrong.

22. Counsel for Latreefers points out that the most appropriate jurisdiction within which to wind up a company is that in which it is incorporated so that the jurisdiction for which s.221 provides is exorbitant. As the prime purpose of any liquidation is the collection of the company’s assets and their distribution *pari passu* amongst the general body of creditors, it would, so the argument ran, be odd if the jurisdiction conferred by s.221 extended to companies which have no assets here capable of providing a benefit even for the petitioning creditor alone. Great reliance was placed on the statement of Sir Raymond Evershed MR in Banque des Marchand de Moscou (Koupetschesky) v Kindersley to which we have already referred.

23. In that case the plaintiff, the Bank of Moscow had substantial assets in England at the time, 1918, it was dissolved in Russia by Soviet Decree. In 1932 Eve J had made an order to wind it up under s.338 Companies Act 1929 which was in substantially the same terms as s.221(5). The Bank, through its liquidators, then sued a firm in England alleged to owe the bank a substantial sum. The firm sought an order dismissing the action on the ground that the Bank did not exist. The firm contended that not only had the Bank been dissolved in Russia but that there had been no jurisdiction to wind it up in England. Harman J held that the fact that the Bank had had assets in England was a valid ground for making the winding up order. On appeal the firm claimed that Harman J was wrong in that respect. The issue was whether to found jurisdiction it was necessary to demonstrate that the Bank had a place of business or had been carrying on business in the United Kingdom. The decision of this court was that it was not. We have quoted the relevant passage in the judgment of Sir Raymond Evershed MR in paragraph 20 above and need not repeat it. For Latreefers it is submitted we are bound by that case to uphold its submission that for jurisdiction to be established it must be demonstrated that the foreign company has assets within the jurisdiction sufficient to provide some benefit for the petitioning creditor.

24. As Lloyd J pointed out judges at first instance have not so regarded the decision in that case. Thus in Re Compania Merabello [1973] Ch 75 Megarry J referred to the presence of assets and creditors within the jurisdiction as the usual essentials for otherwise it would be futile to make a winding up order (p.86). He considered (p.87) that Sir Raymond Evershed MR was not laying down a requirement which had to be satisfied in all cases. When summarising the essentials to jurisdiction in a normal case (p.91) he treated the existence of assets within the jurisdiction as a factor in establishing a proper connection with the jurisdiction. In that case the asset of the company was a claim against insurers which, if a winding up order were made, would, pursuant to the Third Party (Rights against Insurers) Act 1930, vest in the petitioning creditor.

25. In Re Eloc Electro-Optiek and Communicatie B.V. [1982] Ch. 43 the company had no assets within the jurisdiction. But if the company were wound up then the petitioners who had been unfairly dismissed from their employment with the company would be entitled to claim from the Redundancy Fund maintained under the Employment Protection (Consolidation) Act 1978 for the amount of the judgment it had obtained against the

company. Nourse J considered this to be sufficient. He referred to the judgment of Megarry J in Re Compania Merabello, in particular the summary on pages 91 and 92, and concluded that “the ownership of assets by the company is not a matter of crucial importance”. He emphasised that the essentials to which Megarry J had referred were applicable to “normal cases”.

26. In Okeanos Peter Gibson J was concerned with a case where the foreign company had no assets within the jurisdiction; but if it were wound up the liquidator would have claims for fraudulent or wrongful trading under ss 213 and 214 Insolvency Act 1986. He held (p.221) that those claims were not assets of the company at the time the petition was presented. He then considered Banque des Marchand de Moscou (Koupetschesky) v Kindersley, Re Compania Merabello and Re Eloc Electro-Optiek and Communicatie B.V. and held that in an abnormal case, such as the one before him, the presence of assets in this country is not an essential condition for the court to have jurisdiction to make a winding up order. He considered (p.225/6) that

“..provided a sufficient connection with the jurisdiction is shown, and there is a reasonable possibility of benefit for the creditors from the winding up, the court has jurisdiction to wind up the foreign company.”

27. Finally in Re Real Estate Development Co. [1991] BCLC 210 at p.217 Knox J summarised the three core requirements in the terms quoted in paragraph 20 above. Thus it can be seen that in the space of 40 years the principles to be applied have undergone some reformulation. For Latreefers it is submitted that such subsequent modification is impermissible for the decision of this court in Banque des Marchand de Moscou (Koupetschesky) v Kindersley has at all times been binding on not only judges at first instance but also on this court.

28. That submission is inconsistent with statements in three recent cases in this court in which all or one or more of the first instance cases we have considered have been referred to with approval. The first is Re Paramount Airways Ltd [1993] Ch.223. At p. 240 Sir Donald Nicholls V-C, with whom Taylor and Farquharson LJ agreed, said, albeit not as part of the reasons for his conclusion,

“Section 221 provides that an unregistered company may be wound up under the Act. This embraces all overseas companies, but in practice this has not given rise to difficulties. Despite the width of the statutory provision, the English Court does not exercise its jurisdiction to wind up a foreign company unless a sufficient connection with England and Wales is shown and there is a

reasonable possibility of benefit for the creditors from the winding up: see the review of the authorities by Peter Gibson J. In Re A Company (No 00359 of 1987) [1988] Ch. 210.”

In Re: Titan International [1998] 1 BCLC 102 at p.106 Peter Gibson LJ, with whom Lord Bingham of Cornhill LCJ and Phillips LJ agreed, referred with apparent approval to the fact that the judge had considered that the relevant principles were those summarised by Knox J in Re Real Estate Development. As Lloyd J observed that case was very different.

29. The most recent is Banco National de Cuba v Cosmos Trading (Court of Appeal: Sir Richard Scott V-C, Swinton Thomas and Robert Walker LJJ 9th November 1999 unreported). In that case Neuberger J had held that once a petitioner could bring himself within s.221(5) there was no further statutory fetter on the jurisdiction of the court to wind up an unregistered company. But he then recognised that there are three requirements to be satisfied before an English court will make such an order and referred to judgment of Knox J in Re Real Estate Development and to the judgment of Peter Gibson LJ in Re Titan International Inc. In the Court of Appeal, Bank of Cuba, in its written argument, submitted that in addition to compliance with the express requirements set out in s.221(5) the petitioner had to demonstrate the three further requirements summarised by Knox J in Re Real Estate Development Co. Sir Richard Scott V-C, with whom Swinton Thomas and Robert Walker LJJ agreed, said

“The courts of this country have jurisdiction (using the word “jurisdiction” in the broad sense) to make winding-up orders against foreign companies. Foreign companies are for company law purposes treated as unregistered companies. Section 221 (1) of the Insolvency Act 1986 provides that:

“An[y] unregistered company may be wound up under this Act.”

I emphasise the word “may”. Whether the power should be exercised in respect of a foreign company is a matter of discretion depending on the facts of the case. In a number of cases judicial guidance has been given as to when the discretion should and when it should not be exercised in relation to foreign companies. It is clear and common ground that the court should not exercise its jurisdiction in respect of a foreign company where there is no connection whatever between the foreign company and this jurisdiction, other than the decision of the petitioning creditor (which would be present in every case) to present a winding up petition here.

Recent judicial statements as to the correct approach to petitions to wind up foreign companies are to be found in the judgment of Knox J in Re Real Estate Development Co [1991] BCLC 210, and in the judgment of Lloyd J in Re Latreefers Inc, Stoczna Gdanska SA v Latreefers Inc [1999] 1 BCLC 271.”

30. There was some debate before us whether the three core requirements were pre-conditions for the existence of the statutory jurisdiction or principles to be observed in considering its exercise. Sir Richard Scott's reference to jurisdiction "in the broad sense" suggests that he did not draw any such distinction. Nor do we for there seems to be no reason so to do. It is common ground that if a winding up order is to be made then, at least, the three core requirements must be satisfied. The issue is whether, in addition, the petitioner must demonstrate that the company has sufficient assets within the jurisdiction to provide a reasonable possibility of benefit to either the petitioner or the general body of creditors.

31. Having considered the previously decided cases on the subject at some length we reject the submission for Latreefers that the presence of assets is essential. First, the issue before the Court of Appeal in Banque des Marchand de Moscou (Koupetschesky) v Kindersley was whether it was necessary to demonstrate that the company had had a place of business in England or had previously carried on business in England, not whether the presence of assets was a necessary condition. Any opinion of Sir Raymond Evershed MR deserves the greatest respect but we cannot regard his statement as a decision laying down what is necessary in all cases rather than what was sufficient in that case. As Megarry J, Nourse J and Peter Gibson J have all observed the court must have good reason to make the winding up order and that the existence of assets here will constitute good reason in the normal case. But, like them, we do not regard what is sufficient to provide good reason in the normal case as necessary in all cases.

32. Second, we can see no reason why, in addition to the three core requirements referred to by Knox J, the presence of assets should advance the presumed intention of Parliament. As counsel for the Yard observed liquid assets may be moved from one jurisdiction to another at the entry of a computer command anywhere in the world. An additional requirement for the presence of an asset would introduce an arbitrary element which Parliament cannot have intended. Moreover if the core requirements are satisfied there is no need for the addition of a fourth to ensure that this exorbitant jurisdiction is only exercised for good reason.

33. Thirdly, though the precise point was not argued in Banco National de Cuba v Cosmos Trading so that we may not, strictly, be bound by the decision of this court in that

case we consider that we should follow the dictum of Sir Richard Scott unless good reason to the contrary is shown. The statement of Sir Raymond Evershed MR in Banque des Marchand de Moscou (Koupetschesky) v Kindersley is not such a reason.

34. Accordingly we consider that we can and should apply only the three core requirements to which we have referred in determining whether Lloyd J was right to order the winding up of Latreefers. Latreefers contends that even applying those principles Lloyd J was wrong because no sufficient possibility of benefit to the Yard from the making of a winding up order has been shown. The judge dealt with this argument in his second judgment. He considered that there was sufficient possibility of benefit from (a) the Tangent debt, (b) misfeasance claims against the de jure directors in exposing Latreefers to liabilities under the six contracts without having made any adequate provision to meet them. The judge did not base his decision that there was sufficient possibility of benefit on (c) the credit balance in the Hambros Account, (d) misfeasance claims relating to the disposal by Latreefers in December 1993 of the CFM Deposits or (e) claims under ss. 213 and 214 for fraudulent or wrongful trading. The Yard does not challenge the judge's conclusion regarding (c) but relies on (d) and (e) as additional support for his conclusion. We will consider each in turn.

35. Since Lloyd J made the winding up order Langley J has decided that the Tangent debt was repaid in January 1994. The Yard claims that the subsequent decision must be ignored for it came after the winding up order had been made. We do not accept that submission. The decision of Langley J establishes, subject to appeal, that the Tangent debt did not exist at the time the petition was presented or the winding up order was made. This court must make such order as is appropriate in the circumstances as they are now shown to have existed at the time the petition was presented and the order made - New Brunswick Ry Co. v British and French Trust Corporation [1939] AC 1, 32/3. It has not been shown that Latreefers is likely to obtain permission to appeal, let alone that the prospects of success on any such appeal would alone warrant the making of a winding up order.

36. With regard to the misfeasance claims relied on by the Yard, Latreefers contended that they could not succeed. First it was suggested that they are statute-barred. We reject that submission for we have been shown the Claim Form issued on 11th November 1999. The claim covers not only the causes of action summarised in (b) in paragraph 34 above but those referred to in (d) and (e) as well. In the absence of any evidence from Latreefers as to the

law of Liberia concerning the duties of directors incorporated in Liberia we must assume that they are the same as those of directors of companies incorporated in England. Moreover we accept that the payment in October 1992 and March 1993 of the first instalments due under all six contracts shows that some provision had been made to enable Latreefers to comply with its contractual obligations. Even so the failure to obtain any commitment for further funding or even a comfort letter coupled with the curious sequence of events surrounding the disposal of the benefit of the CFM deposits when it was known that Latreefers was insolvent appear to us to raise a prima facie case which, at least, requires the further investigation suggested by the provisional liquidators. In our view the judge was right to regard the misfeasance claims described in paragraph (b) above as a potential source of benefit and should have so regarded the claims summarised in (d) likewise.

37. There remain the suggested claims under ss. 213 and 214 referred to in (e) above. Latreefers submitted that no such claims may be made in respect of a foreign company. This submission was not foreshadowed in the written argument and no authority was cited in support of it. It was suggested that it was evident that, notwithstanding the terms of ss.221(1) and 229, some of the provisions relating to winding up generally could not apply to foreign incorporated companies. Examples were provisions concerning dissolution. Reliance was also placed on the provisions of ss. 216 and 217 dealing with the re-use of company names in which there are subsections expressly including companies liable to be wound up under Part V.

38. We are prepared to accept, without deciding, that a foreign company cannot be dissolved here for the purposes of English law. We recognise that in the two sections to which we were referred Parliament considered it necessary to provide expressly for the inclusion of foreign companies. Nevertheless we see nothing in the terms of ss.221(1), 229, 213 or 214 to warrant the exclusion of the powers of the court under the latter two sections being exercisable in respect of a foreign company if an order for its winding up has been made in this jurisdiction. This was the view of both Peter Gibson J in Okeanos [1988] Ch.210, 227 and Chadwick J in Re Howard Holdings Inc. [1998] BCC 549, 552, though in each case without argument. It is true that so to hold involves applying to the directors of a foreign company English notions of commercial probity. But we agree with Chadwick J in Re Howard Holdings Inc., at p. 555, that it is difficult to envisage any developed system of corporate law which does not impose some obligation on directors to consider whether the

company is solvent and, if not, to consider what should be done about it. Moreover both sections confer on the court a discretion as to the amount (if any) which the director should contribute to the company's assets. Such a discretion seems to us to be sufficient to enable account to be taken of any problems which might otherwise arise from the fact that the company was incorporated in a foreign jurisdiction.

39. With regard to the merits of such claims the provisional liquidators have again expressed the view that Latreefers has a potential claim for wrongful and perhaps fraudulent trading which require further investigation. There is apparent justification for this view in relation to the events surrounding the disposal of the benefit of the CFM deposits at a time when it was known that Latreefers was insolvent. Such claims may only be brought by a liquidator in a winding up in England. There is no reason to think that Latreefers is likely to be wound up in Liberia or indeed anywhere else. The fact that the wrongful or fraudulent trading claims were not assets of Latreefers at the time the petition was presented or the order made, see Okeanos [ibid] p.224, is immaterial in the light of our decision on jurisdiction for if they are successful the petitioner and general body of creditors will benefit.

40. In summary we consider that the potential claims for misfeasance and wrongful and fraudulent trading do provide a reasonable possibility of benefit to the Yard and other creditors of Latreefers so as to comply with the second core requirement. As we have observed there is no dispute that the other core requirements are satisfied. Subject therefore to the issue of champerty, we would dismiss the appeal of Latreefers against the first and second orders of Lloyd J whereby he ordered Latreefers to be wound up.

Champerty

41. We now turn to those parts of the appeals by which it is contended that proceedings should be stayed or that Lloyd J's order for costs against Latco should be reversed because of the nature of the Yard's arrangements to fund the litigation. It was submitted in the winding up proceedings before Lloyd J. that these funding arrangements were champertous and that in consequence the winding up proceedings should be stayed. He was not so persuaded. It was also contended that to make a costs order against Latco would be to enforce a champertous agreement contrary to public policy. In the Commercial Court proceedings, the defendants applied by summons dated the 10th February 1999 for an order that the

claimants's claims against each of the five defendants should be stayed or that the execution of judgments given in the proceedings in favour of the claimants should be stayed. The summons sought in the alternative an order for discovery of documents relating to the Yard's funding arrangements. The summons was dismissed by Toulson J. in a judgment given on 10th June 1999. He gave permission to appeal mainly because the substance of his decision was going to be challenged in the appeals against Lloyd J.'s orders. The first, third and fifth defendants (Latco, Mr Henriksen and Latmar) appeal against Toulson J's judgment and order. The second defendants (Latreefers) and the fourth defendants (CFM Finance Limited) do not appeal. We are told that CFM Finance is in liquidation. Latreefers is in liquidation by virtue of the order of Lloyd J. which is the subject of the second appeal before this court and Mr Glennie is not instructed by the liquidator. In consequence, the appeal against Toulson J's judgment is limited to seeking a stay of the Commercial Court proceedings against Latco, Mr Henriksen and Latmar or, in the alternative, an order for discovery. There is no appeal before us which seeks to stay proceedings upon the judgment which has been obtained against Latreefers.

42. The Commercial Court proceedings started in March 1994 and it was rather late in the day to apply in 1999 for them to be stayed. The Yard had by then obtained a substantial judgment against Latreefers which had been upheld in the House of Lords. However, it was not until December 1998 that the defendants received information that the Yard was funded by a third party. This prompted the application which came before Toulson J. and the making of equivalent submissions to Lloyd J. in the winding up proceedings. The Yard maintains that the funding agreement is both confidential and privileged, but, in circumstances which it is not necessary to relate in detail, a copy of it is exhibited to a solicitor's affidavit in the winding up proceedings with certain matters blanked out. Subject to this, the Yard has not waived privilege or confidentiality, nor has it adduced evidence of any other facts about the making of the funding agreement.

43. The agreement was made between the Yard and an English shipping broker. It is dated 12th October 1994. The evidence is that the English broker entered into the agreement as agent for an overseas broker who arranged the shipbuilding contracts which are the subject of these proceedings. We are asked to respect as confidential the identity of these brokers and Mr Glennie does not object to us doing so. Points have been taken about the agency in

the past, but Mr Glennie now accepts that he is not in a position to challenge the evidence of the agency. We shall refer for convenience to the overseas broker as “the Funders”.

44. At the time of the agreement, the Commercial Court proceedings had started but had not got very far. Vessels belonging to Latco had also been arrested in France and that had given rise to proceedings there. The Funders consented to continue the legal proceedings against Latreefers, Latco and the other defendants on terms which included:

“1. [The Funders] will cover all expenses outside Poland connected with legal proceedings, both those actually being proceeded and as well as of those that may probably arise, and also expenses connected with the problem of arrested vessels in France, belonging to Latco.

2. In the event of lost trials, [the Funders] will not make a claim against [the Yard] regarding the reimbursement of the born by [the Funders] expenses. [The Funders] will also cover all costs adjudged by any award in favour of all and any of the defendants.

3. All awarded proceeds received by [the Yard], after having won the trial or reached a negotiated settlement with Latco, will [be] shared 45pct by [the Yard] and 55pct by [the Funders]. The above split of proceeds excludes the moneys of pre-delivery instalments already paid by Latreefers Inc/Latco and received by [the Yard]. The split will also not concern the commission already paid by [the Yard] to [the Funders].

4. Ince & Co to be in charge of all legal proceedings and also in charge of all negotiated settlements.

...

6. The Commission Letters of 11th September 1992 and of 28th January 1993 are hereby null and void.”

By an addendum agreement dated 26th February 1997, the Funders agreed to continue to fulfil their obligations under the agreement despite the fact that by then the Yard was in bankruptcy.

45. The commission agreements of 11th September 1992 and 29th (as it in fact was) January 1993 referred to in the funding agreement were agreements between the Yard and the Funders. The fact that the funding agreement purports to bring these agreements to an end is incidentally a strong indication that the English brokers did indeed make the agreement as agent for the Funders. The commission agreements each recite the fact that the Funders acted as brokers in the negotiations for the shipbuilding contracts. The September 1992

agreement relates to the first three hulls and the January 1993 agreement to the fourth, fifth and sixth hulls. The September 1992 agreement provided for the Funders to receive a total commission of 4% of US\$ 27,139,000 for each of the three ships to which that agreement related. The January 1993 agreement provided for the Funders to receive a commission of 5% of US\$ 28,619,000 for each of the three ships to which that agreement related. These commissions were to be payable in four equal instalments after the payment of each instalment provided for in the shipbuilding contracts had been paid by Latreefers to the Yard's bank.

46. It was submitted to Lloyd J. at the hearing which resulted in his second judgment of 27th May 1999 that, since the Yard's litigation had been funded by an agreement which was champertous, any proceedings pursuant to that agreement were an abuse of the process and should be stayed. He was referred to *Groveswood Holdings plc v. James Capel & Co Ltd* [1995] Ch. 80. It was submitted in the alternative that the proceedings before him should be adjourned until the outcome of the similar application which was eventually heard by Toulson J. in the Commercial Court. Lloyd J. rejected this submission. He said:

“It is true that in *Groveswood Holdings* Lightman J. stayed an action on the grounds that it was being financed by a champertous arrangement. It is however clear that neither maintenance nor champerty provides a defence to a cause of action and that, even before 1967 when each constituted both a criminal offence and a tort, neither was a ground for staying an action: see *Martell v. Consett Iron Co Ltd* [1955] Ch. 363. The debt is therefore undoubtedly due from the company. In *Abraham v. Thompson* [1997] 4 All E.R. 362 the Court of Appeal held that an action could only be stayed (apart from particular procedural grounds) if it constituted an abuse of the process and that maintenance of the action did not make it an abuse of the process. That case was not concerned with champerty, but both members of the Court of Appeal made comments on the decision in *Groveswood Holdings* such that it seems to me that it would not be appropriate for me to stay the petition, nor to hold its progress up to await a consideration of the same point in the Commercial Court: See Potter LJ at 374 and Millett LJ at 378.”

47. Toulson J considered authorities relating to maintenance and champerty. He accepted that in the present case the Funders had some legitimate interest in supporting the Yard's claims against the buyer for unpaid instalments and for damages for breach of contract, and those against the other defendants for damages for wrongful inducement of contract. The Funders had an obvious interest in supporting the Yard's claims for unpaid instalments because payments of those instalments would trigger the Funders' entitlement to

receive commission. The Funders had a legitimate commercial interest in supporting the Yard's claims against the buyers for damages for breach of contract both because they might be able to recover sums which would have been paid as commission if the contracts had been performed, and on the broader ground that they had suffered commercial loss as a result of the buyer's breach of contract. He rejected a submission that the Funders had no commercial interest in the Yard's claims against the other defendants on equivalent general grounds. The judge recorded and considered Mr Glennie's submission that the funding agreement was champertous because the share of the spoils for which the Funders had contracted was disproportionate to its genuine commercial interest.

48. It was submitted to Toulson J. on behalf of the Yard that it was not necessary to decide whether the funding agreement was champertous, but rather whether the proceedings were an abuse of process. It was submitted that the judge was not in a position to decide the matter properly on the material before him and in the absence of the Funders whose interests would be affected by any such decision. Mr Glennie countered this last point by submitting that it was for the Yard to establish that an apparently champertous agreement was not champertous. It was open to them to call any necessary evidence. In so far as it might be held that it was for his clients to establish that the agreement was champertous, Mr Glennie promoted his alternative application for discovery.

49. Toulson J. referred to authorities which consider the circumstances in which the court will stay proceedings which are said to be champertous or affected by champerty. These included two recent decisions of this Court, *Abraham v. Thompson* [1997] 4 All E.R. 362 and *Faryab v. Smyth* (unreported) 28th August 1998. He noted that the forms of mischief with which the modern law of champerty is concerned were those identified by Lord Mustill in *Giles v. Thompson* [1994] 1 A.C. 142 at 164 as being the protection of the purity of justice and the protection of the interests of vulnerable litigants. There is a public interest that impecunious litigants with genuine claims should be able to bring them before the courts: and a public interest that vulnerable litigants are protected from opportunistic exploitation. Toulson J. considered, however, that, if a Funder has been over-greedy in the bargain for which he has stipulated, it will hardly protect the litigant to stay his action from proceeding at all. The question in this case was whether the action should be stayed to protect the purity of justice. There remained a public interest in preventing the development of an unlicensed and unregulated market in litigation for fear of the abuses to which that might lead in the hands of

the unscrupulous. It was a legitimate potential ground of concern if the Funder's interest in the litigation was tenuous by comparison with his prospective share of the spoils.

50. Mr Glennie submitted to Toulson J. that the funding agreement in the present case necessarily gave rise to a legitimate fear of the kind of abuses which the cases have identified. He submitted that it was not necessary to look at the precise circumstances of the individual case because the consideration was one of wider public policy. Toulson J. did not accept that it was unnecessary to look at the circumstances of the individual case. He then said:

“If the action against the applicants is to be stayed, it must be because it has been established that in this case there is sufficient likelihood of abuse to justify staying the action by the claimant, notwithstanding the fundamental principle emphasised by the Court of Appeal in *Abraham*, in the passage which I have already cited from the judgment of Potter L.J., that litigants with bona fide claims should ordinarily be entitled to have them determined by a court.”

Having considered further submissions, Toulson J. then said:

“It has not been suggested that [the Funders] are shady companies, nor does the evidence before me suggest that they are in the habit of supporting litigation by third parties. Their role appears to be that of a pure funder, the conduct of the action being, as the funding agreement itself provided, in the hands of the solicitors for the Yard. There is, in my view, no ground to conclude that there has been, or that there is any real basis for fear that there is a true risk of any of the forms of abuse referred to by Lord Denning in *In re Trepca* and no basis on which I could properly hold that the continuation of the claims against the applicants is an abuse of the process of the court. It is therefore unnecessary for me to reach a conclusion whether the agreement was champertous and it is better that I should not do so for the reasons which I have already given and for those referred to by Chadwick L.J. in *Faryab*.”

51. In his costs judgment of 27th May 1999, which is the subject of the fourth appeal before this Court, Lloyd J. said this on the subject of champerty:

“Mr Pascoe [who appeared on behalf of Latreefers] had a separate point as a reason for not making a s. 51 order against Latco, and that is this. He says that the evidence shows that the proceedings by the Yard have themselves been funded by a third party under an agreement which he says offends against the legal principles of public policy as being champertous. He says that if that is the case the court should not make an order for costs because such an order would either result in the champertous maintainer receiving the benefit of

funds under an illegal agreement or, if the maintainer does not receive the funds, then the Yard receives the funds and that is in breach of the indemnity principle as regards costs. ...

... I am prepared to assume for present purposes without having decided, that the agreement is champertous, but it seems to me that what is clear is that if the costs are paid they will go to pay the bills pro tanto of the solicitors and counsel who have acted for the Yard. That may indeed reduce the amount for which the maintainer is liable, as between it and the Yard; but I do not see any reason to suppose that that is, in itself, necessarily contrary to public policy or in breach of the indemnity principle ...”

52. Before this Court, Mr Glennie submitted that the funding agreement was champertous. The Funders had agreed to give financial assistance to one of the parties to litigation and in return were to receive a share of the proceeds of the litigation. Although it might be said that the Funders had an interest in the litigation deriving from their commission agreements, their potential share of the proceeds of the litigation was disproportionately large in comparison with their pre-existing interest. Accordingly they had no legitimate interest to intermeddle with the litigation to that extent so that they should be regarded as trafficking in the litigation. The Court should regard this as an abuse and should stay the proceedings. Mr Glennie calculated that the total commission which the Funders would have received if all six vessels had been completed and paid for would have been just over \$7.5m. Of this, approximately \$500,000 had been paid, leaving approximately \$7m. The funding agreement provided for the Funders to receive 55% of “all awarded proceeds received” by the Yard. If the pleaded claims in the Commercial Court action succeeded in full and were paid in full, the Funders’ share would amount to approximately \$40m. Mr Glennie accepted that this Court is bound to decide the issues relating to champerty in accordance with recent decisions of this Court, including *Faryab v. Smyth*. But he submitted that the door was open for the Court to stay a case where there is a funding arrangement which has significant hallmarks of trafficking in litigation. He submitted that this is such a case. He submitted that, where the principle is one of public policy, there should be a general rule referable to the nature of the funding agreement and the litigation to which it relates. He submitted that Toulson J. was wrong to say that the question whether there was a real risk of abuse should be decided by reference to the particular detailed facts of the case. He submitted that an agreement should be regarded as champertous if the potential profit to the Funder is significantly greater than his pre-existing interest. On the question of abuse, he submitted that the Court should look to see if the agreement has a tendency to corrupt the proceedings.

53. The law relevant to these submissions may conveniently be taken, as Mr Glennie accepted, from the judgments of this Court in *Faryab v. Smyth*. Mr Faryab claimed against the defendant an interest in substantial properties on the basis of an alleged partnership. After a lengthy trial, Blackburn J. dismissed Mr Faryab's claims. Mr Faryab appealed. His notice of appeal originally extended to some 60 pages. An amended notice of appeal reduced that to 18 pages. The order which he sought on appeal was limited to payment of £2m plus interest said to be due under a compromise agreement. Mr Faryab had been ordered to provide security for the costs of the appeal by paying £40,000 into court. He provided this security in accordance with the order. The respondent applied to the court for an order that the appeal be dismissed as an abuse of the process of the court. One of the grounds of this application was that Mr Faryab had entered into a champertous agreement in order to raise the £40,000. Mr Faryab's evidence was that he was impecunious but that he had managed to raise the £40,000 by agreements with four people. He said that he had offered a "pyramid package" by which "the higher the total investment from any individual member of the consortium the higher the return exponentially". Under one of the agreements, a contributor had agreed to provide £10,000 towards the sum required as security for costs. Mr Faryab had agreed to repay this sum plus interest at the annual rate of 8% plus a sum of £30,000 upon the determination of Mr Faryab's appeal. The Court had not seen the other three agreements, but the evidence was that they were in identical terms except for the respective amounts. Those who financed the security for costs which Mr Faryab had been ordered to give therefore stood to receive a profit of 300% in addition to interest at a commercial rate upon the determination of the appeal and irrespective of its result.

54. The first judgment of this court was that of Chadwick L.J. He said that there were two questions for decision: The first, whether the agreements were unlawful and contrary to the public policy on the ground of champerty; and, second, if so, whether further proceedings on the appeal should be stayed on that ground. He said that it was convenient to consider the second question first. If the conclusion was that the proceedings should not be stayed even if the agreements were champertous, it was unnecessary to resolve the first question. Unless it was plain and obvious that the funding contracts were champertous, which in his view it was not, the court should avoid deciding that question in the absence of the lenders, who would be affected by a finding of champerty, unless it was necessary to do so. He considered that it was not necessary to decide whether the funding agreements were champertous in order to determine the application. He was satisfied that, upon a true analysis of the authorities, it

would not be right for the court to stay further proceedings on the appeal on the basis that the funding agreements were (if they were) unlawful and contrary to public policy on the grounds of champerty.

55. Chadwick L.J. considered the authorities at some length. He gave extended consideration to *Martell v. Consett Iron*, which was a decision before criminal and tortious liability for maintenance and champerty were abolished by the Criminal Law Act 1967. This case emphasised the important distinction between the proceedings themselves, which may be genuine and viable, and the means by which and the purpose for which they are maintained. It was well settled that illegal maintenance of the plaintiff in an action is no defence to the action. There was the possibility of staying proceedings as an abuse, but each of the three judgments suggested that it might well not be just to do so in particular cases. Chadwick L.J. referred to *Groveswood Holdings v. James Capel*, where Lightman J. considered that it would be both logical and right in any ordinary case to stay proceedings which were maintained champertously as constituting an abuse of process. Lightman J. had noted that *Martell v. Consett* was concerned with maintenance where there is no aggravation. He had no doubt that he was free in the case of a champertous agreement such as that before him to grant a stay to prevent a continuing abuse of process. Chadwick L.J. recorded that Lightman J.'s approach had been considered by this court in *Abraham v. Thompson*. He cited a passage from the judgment of Potter L.J. in that case at 374A-D, and also this passage from the judgment of Millett L.J. at page 377G:

“Before 1967 maintenance was not only contrary to public policy but also both tortious and criminal. Even so, it was not an abuse of the process of the court for a plaintiff without the means to pay his own costs let alone to meet those of the defendant to bring proceedings with financial assistance provided by a third party, and the court would not stay such proceedings on this ground (see *Martell v. Consett Iron Co Ltd* [1955] 1 All E.R. 481, [1955] Ch. 363).

In that case Jenkins L.J. gave three reasons for this. First, it was well settled that the fact that an action was being illegally maintained was no defence to the action, and it was impossible to reconcile this with the proposition that it afforded a proper ground for a stay of the proceedings. Secondly, once there had been illegal maintenance the proceedings were irretrievably tainted; the taint could not be purged except by discontinuing the proceedings and bringing a fresh action. But this would effectively make maintenance a defence to the action, which it does not. Thirdly, it was undesirable that the question whether the action was being illegally maintained should be adjudicated upon in interlocutory proceedings in the action, for this procedure involved the trial of what was, at least theoretically, still a crime in the absence of the accused.”

Chadwick L.J. then said:

“It was accepted by this Court in *Abraham v. Thompson* that, although the court retains the power to stay proceedings if satisfied that they constitute an abuse of process, the mere fact that the proceedings are being financed by a third party with no interest in the outcome - other than in relation to the prospects of repayment - is not of itself sufficient abuse to invoke the jurisdiction of the court. The court is entitled to protect its own procedures; see *Roache v. News Group Newspapers* The Times, November 23, 1992; but it should be careful not to use that power so as to deny access to justice to a party who has sought to fund his proceedings in a way which may itself become contrary to public policy, unless that which has been done can be seen to amount to an abuse of the court’s own process.”

56. Chadwick L.J. considered what element of public policy was affronted by the funding arrangement in the case before the court. He referred to the well known passage from the speech of Lord Mustill in *Giles v. Thompson* [1994] 1 A.C. 142 at 161B. He said that the description of maintenance referred to in that passage was indistinguishable from that given by Jenkins L.J. in *Martell v. Consett Iron*. Chadwick L.J. then said:

“That conduct, of itself, has not been regarded as an abuse of process. Does the offensive conduct become an abuse because there is some notion of a division of the spoils? In my view the court is required to consider in the light of the facts in each case whether its process is affected or threatened by the agreement for the division of spoils.”

57. Chadwick L.J. considered that there was no abuse of the process of the Court of Appeal if the appellant’s ability to comply with an order for security for costs resulted from a funding agreement provided on terms that the funders would obtain a substantial premium on repayment of the loan. He considered that the court did not have any other interest in protecting its process from abuse which required it to prevent the appeal from continuing. He said that, although there might well be cases where the court could see that there is some feature - “some element of trafficking in litigation” - which must be regarded as abusive, that feature was not present in the case before the court. He also considered that the court should discourage satellite litigation of the kind before the court in that application.

58. Simon Brown L.J. agreed that the application for a stay should be dismissed. He said:

“What distinguishes lending from maintenance on the one hand and, in turn, maintenance from champerty on the other, seems to me at the border lines to raise very difficult questions. Similarly, the point at which any particular funding agreement, even assuming it is technically champertous, could be said to constitute an abuse of process is itself very far from clear. Many factors are likely to be in play. Amongst them will be these: (1) the terms of the funding agreement between the litigant and his funder; (2) their relationship quite apart from that agreement; (3) whether or not (and if so how and in what circumstances) the litigant proposes to repay the funder; (4) the relationship between the fund provided, the sum (if any) to be repaid and the sum at issue in the action; (5) the precise purpose within the proceedings for which the fund was provided.”

He considered that the all important feature of the case then before the Court was that the money was provided to meet the order for security for costs and was therefore money available for payment not of the appellant’s costs, but rather of the respondent’s costs, assuming that she succeeded in defeating the appeal. It was less than clear that the funders had engaged in what Lord Mustill in *Giles v. Thompson* had described as “wanton and officious intermeddling with the disputes of others in which they have no interest and where that assistance is without justification or excuse”.

59. Maintenance and champerty are no longer criminal or tortious. In certain circumstances, they remain contrary to public policy. There are many commonplace and unobjectionable circumstances in which modern litigation is funded by those who are not the nominal parties to it. Obvious examples of this are funding by insurers, trade unions or lawyers engaged on legitimate conditional fee agreements. If an agreement of this general kind is held to be contrary to public policy, it may be unenforceable. That may have a variety of consequences. A claim which depends on the assignment of a bare right of action may fail because the assignment is ineffective. A person who has funded an action champertously may fail to enforce recovery of the agreed proportion of the spoils. A person who has secured a champertous agreement to fund his litigation may be unable to enforce payment of the agreed funds. But the fact that a funding agreement may be against public

policy and therefore unenforceable as between the parties to it is by itself no reason for regarding the proceedings to which it relates or their conduct as an abuse.

60. As Chadwick L.J. said in *Faryab v. Smyth*, the question whether the courts' process is affected or threatened by an agreement for the division of spoils is one to be considered in the light of the facts in each case. We reject Mr Glennie's submission that the court should formulate a more circumscribed test limited to a consideration of the structure and apparent purpose of the funding agreement and the kind of litigation to which it is directed. The considerations to which Simon Brown L.J. referred in *Faryab v. Smyth* may in a particular case be relevant and important but they are not exclusive nor necessarily determinative in the abstract. Unless the funding agreement is plainly and obviously champertous, it will usually not be necessary to decide that question for the reasons given by Chadwick L.J. and by Millett L.J. in *Abraham v. Thompson*.

61. Abuse of the court's process can take many forms and may include a combination of two or more strands of abuse which might not individually result in a stay. Trafficking in litigation is, by the very use of the word "trafficking", something which is objectionable and may amount to or contribute to an abuse of the process. We think that it is undesirable to try to define in different words what would constitute trafficking in litigation. It seems to us to connote unjustified buying and selling of rights to litigation where the purchaser has no proper reason to be concerned with the litigation. "Wanton and officious intermeddling with the disputes of others in which they [the funders] have no interest and where that assistance is without justification or excuse" may be a form of trafficking in litigation. Lord Mustill's words, quoted by Simon Brown L.J. in the context of an application to stay, are powerfully descriptive of the kind of plain and obvious champerty of which Chadwick LJ considered *Faryab v. Smyth* itself not to be an example. A large mathematical disproportion between any pre-existing financial interest and the potential profit of funders may in particular cases contribute to a finding of abuse but is not bound to do so.

62. In the present appeals, Mr Glennie's only point of substance on this topic is the disproportion for which he contends. It is not, we think, an insignificant point, but we agree with both judges who have considered it that it does not lead to a conclusion on the facts of this case that there has been or is likely to be an abuse of the court's process. The question is not, we think, to be judged only on the facts as they would have appeared in October 1994,

since the question is whether there is now an actual or threatened abuse. But, even in October 1994, Mr Glennie's calculated disproportion, which is substantial but not grossly so, was capable of being seen as theoretical only. The real chances of the Yard actually receiving the full amount of their pleaded claim must have been seen as doubtful. Meanwhile, the Funders were themselves undertaking to be responsible for the costs of what was likely to become (and has in fact obviously become) very expensive litigation. They had an obvious and substantial pre-existing interest in the subject matter of the litigation. Their commission agreements had entitled them to very substantial payments if the shipbuilding contracts had been fully performed. It is also, we think, significant both that the Funders agreed to cover all costs awarded against Latreefers in favour of all or any of the defendants, and that the conduct of all legal proceedings and settlement negotiations was to be in the hands of experienced solicitors. The Funders therefore had no opportunity to influence the conduct of any proceedings abusively. These features, in our judgment, make it plain that this funding agreement was not trafficking in litigation and came nowhere near being wanton and officious intermeddling with the disputes of others as described by Lord Mustill in *Giles v. Thompson*. In our judgment, there is no abuse of process and Lloyd J. and Toulson J. were correct so to find.

63. We are strongly inclined to the view that this funding agreement was not champertous. It is not necessary to reach this conclusion for the reasons given by Chadwick L.J. in *Faryab v. Smyth*, and we only refrain from doing so for those reasons. We should reach the conclusion that there was no abuse even if, at the conclusion of further satellite litigation, we were persuaded that technically this agreement should be given the label champertous. The alternative application for discovery would therefore serve no purpose and was rightly refused.

64. In the result, we dismiss the appeal against Toulson J's order and hold that the submissions about champerty have no force in the first two appeals against Lloyd J's decisions in the winding up proceedings. As to the appeal against Lloyd J's costs order in the winding up proceedings, the proceedings themselves were not an abuse. There was, in our view, no breach of the indemnity principle. The principle is that you cannot recover under a costs order against another party more than you yourself are obliged to pay in costs to your own lawyers. The funding agreement has no effect on this question in this case. The Yard's lawyers are no doubt entitled to be paid irrespective of the terms of the funding

agreement. If, contrary to our strong inclination, the funding agreement was champertous and therefore unenforceable, an order for costs against Latco would not constitute enforcing it. It would simply be an order to pay costs which had been incurred. These were in substance Lloyd J's reasons for rejecting the submissions made to him. In our judgment, he was right to do so.

S.51 Costs Order

65. On 14 December 1998, the Yard's solicitors wrote to Latreefers' solicitors giving them notice that in the event of the winding up petition succeeding they would seek an order for the Yard's costs to be paid by Latco. Affidavits by the solicitors on either side were exchanged, and Latco was represented on the Yard's application for costs by Mr. Pascoe.

66. The judge acceded to the Yard's application by ordering Latco to pay the Yard's costs of the petition in so far as they had been increased by the opposition of Latreefers. He refused permission to appeal but permission was granted by Robert Walker LJ on 21 July 1999 largely on the basis, as he put it, that

“since the substance of this troublesome matter is to be considered in pending appeals against two substantive orders in the same matter, it is appropriate that the costs made on 27 May 1999 should also be before the court”.

67. The parts of section 51 of the Supreme Court Act 1981 which are relevant for current purposes read as follows: -

“Subject to the provisions of this or any other enactment and to rules of court,
the costs of and incidental to all proceedings in –

the civil division of the Court of Appeal;
the High Court

shall be in the discretion of the court

The court shall have full power to determine by whom and to what extent the
costs are to be paid.”

68. As has been pointed out many times, section 51 of the Supreme Court Act 1981 gives no guidance as to the manner in which the discretion to award costs falls to be exercised.

However, following the decision of the House of Lords in Aiden Shipping Co. Ltd. V Interbulk Ltd. [1986] AC 965, it is now well established that the discretion to award costs is not subject to any implied limitation that costs can only be awarded against those who are parties to the litigation but may, in appropriate cases, be exercised to make orders for costs against non-parties where justice so requires.

69. In Symphony Group PLC v Hodgson [1994] QB 179 at 191-2, Balcombe LJ made an analysis of the various circumstances in which the court had, by that date, been prepared to make orders for costs against non-parties. He went on to identify a number of applicable principles. Those principles have been given further consideration in a number of subsequent cases; in particular in three decisions of this court, Murphy v Young's Brewery [1997] 1 WLR 1591; TGA Chapman Ltd v. Christopher [1998] 1 WLR 12 and Globe Equities Ltd v. Globe Legal Services Ltd (5 March 1999: unreported).

70. In the latter case, Morritt LJ, giving the leading judgment, with which Butler-Sloss and Sedley LJ agreed, made a number of observations on the first principle set out by Balcombe LJ in Symphony Group PLC v Hodgson [1994] QB 179 at 192, namely that “an order for the payment of costs by a non-party will always be exceptional”. He pointed out that the answer to the question as to the standard by which the circumstances of a given case were to be judged exceptional had been given by Phillips LJ in Chapman v Christopher [1998] 1 WLR 12 at 20, namely: -

“The test is whether they (i.e. the features relied on) are extraordinary in the context of the entire range of litigation that comes to the court.”

Morritt LJ continued: -

“I would also comment that there appears to me to be a danger of treating the requirement that the circumstances are “exceptional” as being part of the Statute to be applied. It is not. The epithet originates in the first proposition enunciated by Balcombe LJ in Symphony Group PLC v Hodgson, but it is based on what Lord Goff said in Aiden Shipping Co. Ltd v Interbulk Ltd [1986] 1 AC 965,980.

“In the vast majority of cases, it would no doubt be unjust to make an award of costs against a person who is not a party to the relevant proceedings. But as the facts of this case show, that is not always so.”

In none of the cases to which I have referred have “exceptional circumstances” been elevated into a precondition to the exercise of the power; nor should they be.

Ultimately, the test is whether in all the circumstances it is just to exercise the power conferred by subsections (1) and (3) of section 51 of the Supreme Court Act 1981 to make a non-party pay the costs of the proceedings. Plainly, in the ordinary run of cases where the party is pursuing or defending the claim for his own benefit through solicitors acting as such there is not usually any justification for making someone else pay the costs. But there will be cases where either or both these two features are absent. In such cases, it will be a matter for judgment and the exercise by the judge of his discretion to decide whether the circumstances relied on are such as to make it just to order some non-party to pay the costs. Thus, as it seems to me, the exceptional case is one to be recognised by comparison with the ordinary run of cases, not defined in advance by reference to any further characteristic.”

71. We adopt this approach in the current appeal. Mr. Glennie in the course of argument sought to persuade us that in cases such as the present, where a parent company had been made liable for the costs of proceedings incurred by its subsidiary, the criteria upon which such orders have been made are unclear, and that this court should lay down guidelines for the assistance of judges of first instance and the legal profession. We have considered this request with care, but for the reasons given by Morritt LJ in the passage from Globe Equities Ltd v. Globe Legal Services Ltd which we have cited, we do not think that such an exercise would be either helpful or productive. This is an area of the law in which the truism that each case depends on its individual facts is particularly applicable, and in which satellite litigation (including, of course, appeals) is to be discouraged. Parliament has given the judiciary an unfettered discretion to make orders for costs which are just, and further judicial guidance beyond that which exists already, designed to identify what may or may not be just in different factual circumstances is, in our judgment both unnecessary and likely to expand the scope for further argument.

72. Thus we approach this part of the case by asking the simple question: on the facts of this case was the judge right to exercise his discretion to make an order for costs against Latco?; or to put the matter in a more technical way: does the judge’s decision to make an order against Latco exceed the generous ambit within which reasonable disagreement is possible thereby making it plainly wrong?: see Bellenden (formerly Satterthwaite) v Bellenden [1948] 1 All ER 343 at 345 per Asquith LJ, cited with approval in G v G (Minors: Custody Appeal) [1985] 1 WLR 647, 651/2 per Lord Fraser of Tullybelton: see also

Hadmoor Productions Ltd v Hamilton and Another [1983] 1 AC 191 at 220B-c, E per Lord Diplock.

73. The essence of Lloyd J's judgment on this point appears at page 12 of the transcript of his judgment, where he summarises his reasons for making the order against Latco in the following terms:

“My principal reasons are that this company is not and was not a trading company, that it has had no realisable assets beyond the tiny credit balance in its bank account and that it is, on any footing, insolvent; and that the effective decision to contest the petition was a decision taken by Latco to make available the funds for the conduct of that defence. In my judgment, the circumstances of this case show that, in so doing, Latco was consulting its own interests and not that of Latreefers, and that makes it appropriate to order Latco to pay those costs.”

The judge added that the costs were not the whole costs of the petition, because Latco could not be made liable for such costs as would have been incurred if the petition had gone through on an uncontested basis. The judgment, therefore, was for the costs of the petition “in so far as they had been increased by Latco's opposition, including the costs of the two contested hearings before the judge.”

74. In reaching his conclusion, Lloyd J directed himself correctly on the principles laid down in Aiden Shipping Co. Ltd. V Interbulk Ltd. [1986] AC 965, and considered a number of the subsequent cases, including Abraham v Thompson [1997] 4 All ER 362 and Chapman v Christopher [1998] 1 WLR 12. He accepted Mr. Pascoe's argument that the mere fact that Latco had funded the proceedings was not, of itself, a sufficient reason for making an order for costs against Latco. He considered, and distinguished on its facts, the decision of Colman J in The Kommunar (No 3) [1997] 1 Lloyds Rep. 22. Lloyd J also specifically rejected Mr. Pascoe's argument that because it had transpired that the Yard was itself (as Mr. Pascoe argued) being champertously funded by a third party, to make an order for costs against Latco would result in the Yard receiving the benefit of the champertous agreement which was otherwise unenforceable as being contrary to public policy.

75. Four points are advanced in the notice of appeal, three of which were developed in argument before us. The first is that just summarised. Mr. Glennie, in oral argument, accepted that this point effectively stood or fell on the view which the court took on the third appeal (the appeal against Toulson J's refusal to stay the proceedings by the Yard in the Commercial

Court) and for the reasons we have already given, we reject it as a ground for attacking the exercise of Lloyd J's discretion to make an order for costs against Latco in the winding up proceedings.

76. The second ground is to the effect that the judge, having correctly held that funding by Latco of Latreefers' opposition to the petition was not of itself sufficient to justify an order against Latco under section 51 nevertheless held that the effective decision to contest the petition was Latco's decision to make available funds for the defence and that was sufficient to justify the order sought. We reject this ground, which fails to do justice to the judge's judgment. The fact of funding, as the judge recognised, is only the first step in the argument. The judge then had to consider all the relevant circumstances of the case, including, of course, the nature of the proceedings, the purpose of the funding and the merits of the case advanced by Latreefers in the winding up. The judge then had to decide whether or not, in all the circumstances, an order against Latco met the justice of the case. This exercise the judge performed. To suggest that there is an internal inconsistency within the judgment, or that the judge decided the point on the mere fact of funding is to misread the judgment.

77. The third ground of appeal is that the judge held that in funding Latreefers' defence to the petition, Latco was consulting its own interests and not those of Latreefers. It is contended that he thereby wrongly failed to take any sufficient account of the principle established by The Kommunar (No 3) [1997] 1 Lloyd's Rep. 22 in which it was recognised (in the context of section 51 proceedings) that a parent company has a legitimate interest in preserving and maximising the assets of its subsidiary.

78. We can deal shortly with this point. The judge distinguished The Kommunar on its facts, and in our judgment was plainly right to do so. As the judge put it:-

“So far as funding by a parent company is concerned, [counsel] cited in particular The Kommunar which is a very different case on the facts but in which Colman J refused to make an order that the parent company be jointly and severally liable for a subsidiary's costs as plaintiff in some unsuccessful proceedings. That was a case in which he said that the parent company stood to gain by the increase in the assets of its subsidiary if the action succeeded and that was a legitimate motive for the proceedings and for lending assistance to the subsidiary. That is, I think a very different case both on the facts and in the relevant analysis from the present case.”

In our judgment, The Kommunar lays down no general principle. It simply decides that on the facts of that case the parent company in question had a legitimate interest in preserving and maximising the assets of its solvent subsidiary. In the instant case the question is not, as in The Kommunar, whether the parent company's funding of the litigation could be justified on the basis that the interests of the shareholders were synonymous with those of the parent company; the proper question in the instant case is whether or not persistence by Latco in the defence of the winding up petition was in the interests of Latreefers' creditors - a proposition to which there could only be one answer. Mr. Glennie invited us, if we were against him on this point, to hold that The Kommunar was wrongly decided. For the reasons we have given, we think it neither necessary nor appropriate to do so.

79. The fourth ground of appeal depended in substance upon the proposition that there was a reasonable possibility that the debt owed by Tangent Shipping to Latreefers would be realised in the winding up and that, accordingly, the judge erred in principle in failing to take any or any adequate account of that possibility. Mr. Glennie realistically recognised that the judgment of Langley J in the action between Latreefers and Tangent Shipping was fatal to this point, notwithstanding that the judgment may be subject to an application for permission to appeal. Accordingly we need say no more about this ground of appeal.

80. In our view it is necessary to bear in mind that Latreefers is insolvent. The evidence does not indicate that it ever had sufficient loan or share capital to enable it to perform its contractual obligations. The order sought by the winding up petition was opposed in the interests of Latco, not those of either Latreefers or its creditors. In our judgment the answer to the simple question "is it just, if a parent company in these circumstances chooses, for its own reasons, to defend a winding up petition brought against its subsidiary by the latter's principal creditor to order it to pay the costs?" is in the affirmative.

81. For all these reasons, there is in our judgment no substance in any of the grounds of appeal against the order for costs against Latco made by Lloyd J. Far from being an inappropriate exercise of judicial discretion, we think that the judge was plainly right to make the order, and the appeal must be dismissed.

Conclusion

82. For all these reasons we dismiss the appeals

(a) of Latreefers from the orders of Lloyd J made on 21st December 1998 and 27th May 1999; and

(b) of Latco, Mr Henriksen and Latmar from the order of Toulson J made on 10th June 1999.

Order: Appeal dismissed. Order as per minute of order.

The Attorney General of Canada
(*Defendant*) *Appellant*;

and

**Inuit Tapirisat of Canada and the National
Anti-poverty Organization** (*Plaintiffs*)
Respondents.

1980: February 12; 1980: October 7.

Present: Laskin C.J. and Martland, Dickson, Beetz,
Estey, McIntyre and Chouinard JJ.

ON APPEAL FROM THE FEDERAL COURT OF
APPEAL

*Administrative law — Decision of CRTC — Review
by Governor in Council — Rules of natural justice and
duty of fairness — Whether Governor in Council sub-
ject to judicial review — National Transportation Act,
R.S.C. 1970, c. N-17 as amended, s. 64 — Railway
Act, R.S.C. 1970, c. R-2 as amended, ss. 320, 321(1) —
Interpretation Act, R.S.C. 1970, c. I-23, s. 28.*

After the approval by the CRTC of a new rate structure for Bell Canada, the plaintiffs-respondents appealed the CRTC decision to the Governor General in Council pursuant to s. 64(1) of the *National Transportation Act*. Their petitions having been denied, the respondents attacked the decisions of the Governor General in Council alleging that they had not been given a hearing in accordance with the principles of natural justice. This appeal arises from an application made in the Trial Division of the Federal Court for an order striking out the plaintiffs' statement of claim on the ground that the statement disclosed "no reasonable cause of action". The application was granted but the Federal Court of Appeal set aside the order of the Trial Division judge. Hence the appeal to this Court.

Held: The appeal should be allowed.

The substance of the question before this Court in this appeal is whether there is a duty to observe natural justice in, or at least a duty of fairness incumbent on, the Governor in Council in dealing with parties such as the respondents upon their submission of a petition under s. 64(1) of the *National Transportation Act*.

Such petitions are to be contrasted with the mechanism for appeal to the Federal Court of Appeal on questions of law or jurisdiction provided in subs. (2) and following of s. 64. The courts have held that the rules of natural justice and the duty to act fairly depend on the

Le procureur général du Canada
(*Défendeur*) *Appelant*;

et

**Inuit Tapirisat of Canada et l'Organisation
nationale d'anti-pauvreté** (*Demandereses*)
Intimées.

1980: 12 février; 1980: 7 octobre.

Présents: Le juge en chef Laskin et les juges Martland,
Dickson, Beetz, Estey, McIntyre et Chouinard.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit administratif — Décision du CRTC — Révision du gouverneur en conseil — Règles de justice naturelle et obligation d'agir équitablement — Contrôle judiciaire du gouverneur en conseil ou non — Loi nationale sur les transports, S.R.C. 1970, chap. N-17 et modifications, art. 64 — Loi sur les chemins de fer, S.R.C. 1970, chap. R-2 et modifications, art. 320, 321(1) — Loi d'interprétation, S.R.C. 1970, chap. I-23, art. 28.

Après l'approbation par le CRTC d'une nouvelle structure de tarifs pour Bell Canada, les demandereses-intimées ont appelé de la décision du CRTC au gouverneur en conseil conformément au par. 64(1) de la *Loi nationale sur les transports*. Leur requête ayant été rejetée, les intimées ont contesté les décisions du gouverneur en conseil alléguant qu'elles n'ont pas eu d'audience conforme aux principes de justice naturelle. Ce pourvoi découle d'une demande adressée à la Division de première instance de la Cour fédérale visant la radiation de la déclaration des demandereses pour le motif qu'elle ne révèle «aucune cause raisonnable d'action». La déclaration a été accueillie, mais la Cour d'appel fédérale a infirmé l'ordonnance du juge de la Division de première instance. D'où le pourvoi à cette Cour.

Arrêt: Le pourvoi est accueilli.

Le fond de la question soumise à cette Cour en l'espèce est de savoir si le gouverneur en conseil a l'obligation d'observer les règles de justice naturelle ou, du moins l'obligation d'agir équitablement, lorsqu'il examine une requête que des parties comme les intimées ont présentée en vertu du par. 64(1) de la *Loi nationale sur les transports*.

Il faut souligner la différence entre ces requêtes et le processus d'appel à la Cour d'appel fédérale sur des questions de droit ou de compétence conformément au par. 2 et suivants de l'art. 64. Les tribunaux ont jugé que les règles de justice naturelle et le devoir d'agir équita-

TAB 6

circumstances of the case, the nature of the inquiry or investigation, the subject matter that is being dealt with, the consequences on the persons affected and so forth. The mere fact that a decision is made pursuant to a statutory power vested in the Governor in Council does not mean that it is beyond review if the latter fails to observe a condition precedent to the exercise of that power, whether such power is classified as administrative or quasi-judicial. However in this case, there is no failure to observe a condition precedent but rather the attack is directed at procedures adopted by the Governor in Council, once validly seized of the respondents' petitions. The very nature of the Governor in Council must be taken into account in assessing the technique of review which he adopted. The executive branch cannot be deprived of the right to resort to its staff, departmental personnel and ministerial members concerned with the various policy issues raised by a petition.

Under s. 64(1), the Governor in Council is not limited to varying orders made *inter partes* but he may act "of his motion"; he may act "at any time"; he may vary or rescind any order, decision, rule or regulation "in his discretion". Parliament has in s. 64(1) not burdened the Governor in Council with any standards or guidelines in the exercise of its rate review function. Nor were procedural standards imposed or even implied. The discretion of the Governor in Council is complete provided he observes the jurisdictional boundaries of s. 64(1). Furthermore there is no need for the Governor in Council to give reasons for his decision, to hold any kind of hearing, or even to acknowledge the receipt of a petition. Where the executive branch has been assigned a function performable in the past by the Legislature itself and where the *res* or subject matter is not an individual concern, considerations different from *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, arise. In such a circumstance the Court must fall back upon the basic jurisdictional supervisory role and in so doing construe the statute to determine whether the Governor in Council has performed its functions within the boundary of the parliamentary grant and in accordance with the terms of the parliamentary mandate.

Further, there is nothing in s. 64(1) to justify a variable yardstick for the application to that section of the principle of fairness according to the source of the information placed before the Governor in Council. Once the proper construction of the section is determined, it applies consistently throughout the proceedings before the Governor in Council.

blement dépendent des circonstances de l'affaire, de la nature de l'enquête ou investigation, de la question traitée, des conséquences pour les personnes en cause etc. Le simple fait qu'une décision soit prise en vertu d'un pouvoir conféré par la Loi au gouverneur en conseil ne signifie pas que son exercice échappe à toute révision si ce dernier n'a pas respecté une condition préalable à l'exercice de ce pouvoir, que ce pouvoir soit classé comme administratif ou quasi judiciaire. En l'espèce cependant, on n'allègue pas la violation d'une condition préalable, mais l'action vise plutôt les procédures adoptées par le gouverneur en conseil, une fois que la requête des intimées a été validement soumise. Il faut, dans l'évaluation de la technique de révision adoptée par le gouverneur en conseil, tenir compte de la nature même de l'organisme. On ne peut priver l'Exécutif de son droit d'avoir recours à son personnel, aux fonctionnaires du ministère, des ministres membres du conseil concernés par les nombreuses questions d'intérêt public soulevées par la requête.

Le paragraphe 64(1) ne limite pas l'action du gouverneur en conseil à la modification des ordonnances *inter partes*; il peut agir «de son propre mouvement», «en tout temps»; il peut modifier ou rescinder toute ordonnance, décision, règle ou règlement «à sa discrétion». Le législateur n'a pas imposé au gouverneur en conseil par le par. 64(1) de normes ou de règles applicables à l'exercice de sa fonction de révision des tarifs. Il n'a pas imposé non plus de normes de procédure expresses ou même implicites. Le gouverneur en conseil a entière discrétion dans la mesure où il respecte les limites de compétence fixées par le par. 64(1). De plus, le gouverneur en conseil n'a pas à motiver sa décision, à tenir quelque audience que ce soit ni même à accuser réception d'une requête. Si l'Exécutif s'est vu attribuer une fonction auparavant remplie par le législatif lui-même et que la *res* ou l'objet n'est pas de nature personnelle, des considérations différentes de celles de l'arrêt *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 R.C.S. 311, entrent en jeu. En pareil cas, la Cour doit revenir à son rôle fondamental de surveillance de la compétence et, ce faisant, interpréter la loi pour établir si le gouverneur en conseil a rempli ses fonctions dans les limites du pouvoir et du mandat que lui a confiés le législateur.

De plus, rien au par. 64(1) ne justifie l'adoption d'un critère variable pour appliquer à ce paragraphe le principe d'équité selon la source des renseignements communiqués au gouverneur en conseil. Une fois établie, la bonne interprétation à y donner s'applique à l'ensemble des procédures devant le gouverneur en conseil.

Ross v. Scottish Union and National Insurance Co. (1920), 47 O.L.R. 308; *Wiseman v. Borneman*, [1971] A.C. 297; *Pearlberg v. Varty*, [1972] 1 W.L.R. 534; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109; *Selvarajan v. Race Relations Board*, [1976] 1 All E.R. 12; *Border Cities Press Club v. Attorney General for Ontario*, [1955] 1 D.L.R. 404; *Martineau v. Matsqui Institution (No. 2)*, [1980] 1 S.C.R. 602; *Re Davisville Investment Co. Ltd. and City of Toronto et al.* (1977), 15 O.R. (2d) 553; *Alliance des Professeurs Catholiques de Montréal v. Commission des Relations Ouvrières de la Province de Québec*, [1953] 2 S.C.R. 140; *Bates v. Lord Hailsham*, [1972] 1 W.L.R. 1373; *Essex County Council v. Minister of Housing* (1967), 66 L.G.R. 23, referred to; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, considered.

APPEAL from a judgment of the Federal Court of Appeal¹, setting aside the order of the Trial Division. Appeal allowed and order of the Trial Division restored.

E. A. Bowie, and *H. L. Molot*, for the defendant, appellant.

B. A. Crane, Q.C., and *Andrew J. Roman*, for the plaintiffs, respondents.

The judgment of the Court was delivered by

ESTEY J.—This appeal relates to the proper disposition of an application made in the Trial Division of the Federal Court of Canada for an order pursuant to the rules of that Court striking out the statement of claim and dismissing this action on the grounds that the statement of claim discloses “no reasonable cause of action”. Mr. Justice Marceau of the Trial Division of the Federal Court allowed the application, struck out the statement of claim, and dismissed the action. The Federal Court of Appeal set aside the order of the Trial Division although in doing so found that there was no basis for the relief sought in the statement of claim except with regard to one issue to which I will make reference later. The effect, therefore, of the disposition below is that if left undisturbed, the matter would go to trial on the basis of the pleadings as they now stand.

¹ [1979] 1 F.C. 710.

Jurisprudence: *Ross v. Scottish Union and National Insurance Co.* (1920), 47 O.L.R. 308; *Wiseman v. Borneman*, [1971] A.C. 297; *Pearlberg v. Varty*, [1972] 1 W.L.R. 534; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109; *Selvarajan v. Race Relations Board*, [1976] 1 All E.R. 12; *Border Cities Press Club v. Attorney General for Ontario*, [1955] 1 D.L.R. 404; *Martineau c. L'Institution de Matsqui (n° 2)*, [1980] 1 R.C.S. 602; *Re Davisville Investment Co. Ltd. and City of Toronto et al.* (1977), 15 O.R. (2d) 553; *Alliance des Professeurs Catholiques de Montréal c. Commission des Relations Ouvrières de la Province de Québec*, [1953] 2 R.C.S. 140; *Bates v. Lord Hailsham*, [1972] 1 W.L.R. 1373; *Essex County Council v. Minister of Housing* (1967), 66 L.G.R. 23; arrêt examiné: *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 R.C.S. 311.

POURVOI à l'encontre d'un arrêt de la Cour d'appel fédérale¹, qui a infirmé l'ordonnance de la Division de première instance. Pourvoi accueilli et ordonnance de la Division de première instance rétablie.

E. A. Bowie, et *H. L. Molot*, pour le défendeur, appellant.

B. A. Crane, c.r., et *Andrew J. Roman*, pour les demandereses, intimées.

Version française du jugement de la Cour rendu par

LE JUGE ESTEY—Ce pourvoi a trait à une demande adressée à la Division de première instance de la Cour fédérale du Canada visant la radiation de la déclaration et le rejet de l'action conformément aux règles de la Cour fédérale, pour le motif que la déclaration ne révèle «aucune cause raisonnable d'action». Le juge Marceau de la Division de première instance a accueilli la demande, radié la déclaration et rejeté l'action. La Cour d'appel fédérale a infirmé l'ordonnance de la Division de première instance mais, ce faisant, elle a conclu que le redressement demandé ne se fondait aucunement sur la déclaration, sauf sur un point dont je reparlerai plus loin. Si la décision de la Division d'appel n'est pas modifiée, l'affaire ira à audience sur la base des procédures écrites existantes.

¹ [1979] 1 C.F. 710.

A brief outline of events leading up to these proceedings will be helpful. The Canadian Radio-television and Telecommunications Commission (herein for brevity referred to as the CRTC), in response to an application from Bell Canada, conducted lengthy hearings concerning a proposed increase in telephone rates to be charged to subscribers in the provinces of Ontario and Quebec and in the Northwest Territories. The plaintiffs/respondents participated in these hearings as intervenants throughout. In conducting these proceedings, the CRTC was proceeding under authority provided in the *Railway Act*, R.S.C. 1970, c. R-2 as amended, the *National Transportation Act*, R.S.C. 1970, c. N-17 as amended, and the *Canadian Radio-television and Telecommunications Commission Act*, S.C. 1974-75-76, c. 49. We are not here concerned with the actual proceedings before the CRTC. The balance of the narrative can best be set out by quoting from the statement of claim which, because this is an application for dismissal, must be taken as proved.

5. On June 1st, 1977 the CRTC issued its decision in the matter, which decision denied some of the relief sought by each of the plaintiffs.

6. On June 10th, 1977 ITC [a respondent herein] appealed the decision of the CRTC to the Governor-in-Council pursuant to section 64 of the *National Transportation Act*, requesting the Governor-in-Council to set aside the relevant portion of the decision of the CRTC and to substitute its own order therefor. On June 29th, 1977 Bell Canada issued a reply thereto. While ITC was preparing its final reply to the reply of Bell Canada, the Governor-in-Council decided the appeal adversely to ITC. On July 14th, 1977 Order-in-Council P.C. 1977-2027 was made. ITC's final reply was never submitted.

7. On June 9th, 1977 NAPO [a respondent herein] also appealed the decision of the CRTC to the Governor-in-Council pursuant to section 64 of the *National Transportation Act*, to which Bell Canada prepared a reply dated June 29th, 1977. The Governor-in-Council decided this appeal adversely to NAPO without waiting to receive the final reply of NAPO. On July 14th, 1977 Order-in-Council P.C. 1977-2026 was made. NAPO's final reply was never submitted.

8. In arriving at its decision the Governor-in-Council, following customary practice, allowed no oral presentation but conducted the hearing entirely in writing. However, following the usual practice, the actual written

Il est utile de rappeler brièvement les événements à l'origine de ces procédures. Suite à une demande de Bell Canada, le Conseil de la radiodiffusion et des télécommunications canadiennes (ci-après abrégé en CRTC) a tenu de longues audiences sur l'augmentation envisagée des tarifs de téléphone exigés des abonnés des provinces de l'Ontario et de Québec et des territoires du Nord-Ouest. Les demanderessees intimées ont participé, à titre d'intervenantes, à ces audiences du début à la fin. Le CRTC agissait en vertu du pouvoir que lui confère la *Loi sur les chemins de fer*, S.R.C. 1970, chap. R-2 et modifications, la *Loi nationale sur les transports*, S.R.C. 1970, chap. N-17 et modifications, et la *Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes*, S.C. 1974-75-76, chap. 49. Les audiences qu'a tenues le CRTC ne sont pas pertinentes en l'espèce. La meilleure façon d'exposer les faits est de reproduire les passages suivants de la déclaration qu'il faut tenir pour avérée puisqu'il s'agit d'une demande de radiation.

[TRANSLATION] 5. Le 1^{er} juin 1977, le CRTC a rendu sa décision dans cette affaire, refusant d'accorder une partie du redressement demandé par chacune des demanderessees.

6. Le 10 juin 1977, ITC [intimée en l'espèce] en a appelé de la décision du CRTC au gouverneur en conseil conformément à l'art. 64 de la *Loi nationale sur les transports*, lui demandant d'annuler la partie pertinente de la décision du CRTC et d'y substituer son propre décret. Le 29 juin 1977, Bell Canada a produit une réponse à cette requête. Pendant qu'ITC préparait sa réplique à la réponse de Bell Canada, le gouverneur en conseil a tranché l'appel de façon défavorable à ITC. Le 14 juillet 1977, le décret C.P. 1977-2027 a été adopté. ITC n'a jamais soumis sa réplique.

7. Le 9 juin 1977, l'ONAP [intimée en l'espèce] en a également appelé de la décision du CRTC au gouverneur en conseil conformément à l'art. 64 de la *Loi nationale sur les transports*, et Bell Canada a présenté une réponse en date du 29 juin 1977. Le gouverneur en conseil a tranché cet appel de façon défavorable à l'ONAP sans attendre de recevoir la réplique de cette dernière. Le 14 juillet 1977, le décret C.P. 1977-2026 a été adopté. L'ONAP n'a jamais soumis sa réplique.

8. Pour arriver à sa décision, suivant la pratique habituelle, le gouverneur en conseil n'a pas permis d'argumentation orale, mais a tenu l'audition entièrement par écrit. Cependant, suivant la pratique ordinaire, le texte

submissions of the parties were not presented to the members of the Governor-in-Council but rather, evidence and opinions were obtained from officials of the Department of Communications as to:

- a) What that Department thought were the positions of the parties in the appeal;
- b) The position of the Department, or certain officials thereof, in relation to the facts and issues in the appeal;
- c) Whether either or both of the appeals should be allowed. None of this evidence or these opinions have ever been communicated to the appellants (plaintiffs herein).

9. The CRTC was requested by the Governor-in-Council to submit its views as to the disposition of the appeals. These views of the CRTC were neither made available to the appellants (plaintiffs herein) by the CRTC itself, nor by the Governor-in-Council.

10. The Minister of Communications, at the meeting of the Governor-in-Council at which the appeals were decided, both participated in the making of the decisions and submitted to the meeting her recommendation that the decision be that the appeals be disallowed, together with evidence and argument in support of this recommendation. The submissions of the Minister were a conduit for, were based upon, or at least included evidence, opinions and recommendations from the CRTC and from officials of her Department. Neither the content of these opinions and recommendations nor of any evidence or argument submitted in support thereof has ever been communicated to the appellants (plaintiffs herein), and hence the plaintiffs have been denied an opportunity to make a reply thereto; yet the two decisions and the resultant Orders-in-Council were made on the basis of the submissions of the Minister.

11. The plaintiffs submit that the defendant Governor-in-Council, when deciding a matter on a petition pursuant to section 64 of the *National Transportation Act*, is a Federal Board, Commission or other tribunal within the meaning of section 18 of the *Federal Court Act*.

12. The plaintiffs submit that the defendant Governor-in-Council was required to decide these appeals himself and to reach these decisions by means of a procedure which is fair and in accordance with the principles of natural justice.

13. The plaintiffs submit that in the circumstances, the Governor-in-Council held no hearing in any meaningful sense of that word, and that, therefore, the decisions and Orders-in-Council made pursuant to them are nullities. Alternatively, it is submitted that if there was a hearing,

même des mémoires des parties n'a pas été soumis aux membres du gouverneur en conseil; on a plutôt obtenu des dépositions et des avis de fonctionnaires du ministère des Communications concernant:

- a) l'opinion du ministère sur les positions des parties à l'appel;
- b) la position du ministère, ou de certains de ses fonctionnaires, quant aux faits et aux questions en litige en appel;
- c) la question de savoir si l'un ou l'autre des appels ou les deux devraient être accueillis. On n'a jamais communiqué aux appelantes (demandereses en l'espèce) ces dépositions ou ces avis.

9. Le gouverneur en conseil a demandé au CRTC de faire connaître son opinion sur la disposition des appels. Ces opinions n'ont été communiquées aux appelantes (demandereses en l'espèce) ni par le CRTC lui-même ni par le gouverneur en conseil.

10. A la réunion du gouverneur en conseil où les appels ont été tranchés, le ministre des Communications a à la fois participé aux décisions qui ont été prises et a soumis au conseil sa recommandation de rejet des appels, de même que des dépositions et des arguments à l'appui de cette recommandation. Les mémoires soumis par le ministre ont servi à transmettre les dépositions, opinions et recommandations du CRTC et des fonctionnaires de son ministère; ils étaient fondés sur celles-ci ou du moins les comprenaient. Ni ces opinions et recommandations ni aucune déposition ou argument soumis à leur appui n'ont jamais été communiqués aux appelantes (demandereses en l'espèce), et les demandereses ont par conséquent été privées de la possibilité d'y répondre; pourtant les deux décisions et les décrets en découlant ont été pris sur le fondement des mémoires soumis par le ministre.

11. Les demandereses font valoir que lorsque le gouverneur en conseil défendeur tranche une question qui lui est soumise par requête conformément à l'art. 64 de la *Loi nationale sur les transports*, il constitue un office, une commission ou un autre tribunal fédéral au sens de l'art. 18 de la *Loi sur la Cour fédérale*.

12. Les demandereses font valoir que le gouverneur en conseil défendeur était requis de se prononcer personnellement sur ces appels et d'arriver à ces décisions en suivant une procédure équitable et conforme aux principes de justice naturelle.

13. Les demandereses font valoir que, dans les circonstances, le gouverneur en conseil n'a pas tenu d'audience à proprement parler et que, par conséquent, les décisions et les décrets en découlant sont nuls. Subsidiairement, elles font valoir que, s'il y a eu une audience, la procé-

the procedure employed did not result in a fair hearing, hence the decisions and orders resulting are nullities.

14. Accordingly, the plaintiffs pray for the following relief:

*i)

ii) In the alternative, a declaration that the procedure employed by the Governor-in-Council in these two appeals resulted in:

- a) no hearing having been held, or in the alternative,
- b) such hearing as was held was not a full and fair hearing, in accordance with the principles of natural justice.

iii) Such other relief as the Court deems proper.

* This paragraph being a prayer for issuance of writ of *certiorari* was omitted as the respondents, after the judgment of the court of first instance was issued, no longer advanced this claim. We are now concerned only with para. 14(ii) of the prayer for relief in which a declaration is sought.

Paragraph 14(ii) does not, of course, when read literally, frame a proper request for declaration. There is no declaration sought with reference to any rights or obligations allegedly arising in the parties to the proceeding. The declaration is with reference to a failure to hold a hearing, or, in any case, "a full and fair hearing" without reference to any statutory or other right or duty relating to the parties. The declaration sought should have related to the inferentially alleged invalidity of the two Orders-in-Council issued by the Governor-in-Council in response to the petition of the respondents, and I proceed to dispose of this appeal on the basis that the prayer for relief was so framed.

As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": *Ross v. Scottish Union and National Insurance Co.*² Here Bell Canada in its statement of defence has raised the issue of law as to the position of the Governor in Council when

² (1920), 47 O.L.R. 308 (App. Div.).

dure suivie a empêché qu'elle soit équitable et que, par conséquent, les décisions et les décrets en résultant sont nuls.

14. Les demandereses requièrent donc les mesures correctives suivantes:

*i)

ii) A titre subsidiaire, une déclaration portant que, vu la procédure suivie par le gouverneur en conseil dans ces deux appels,

- a) aucune audition n'a été tenue, ou, subsidiairement,
- b) l'audition tenue n'a été ni complète ni équitable, et ce contrairement aux principes de justice naturelle.

iii) Tout autre redressement que la Cour estime approprié.

* Cet alinéa relatif à la délivrance d'un bref de *certiorari* a été omis vu qu'une fois la décision de première instance rendue, les intimées ont abandonné cette demande. Le seul alinéa soumis est l'al. 14ii) de la demande de redressement qui vise à obtenir une déclaration.

L'alinéa 14ii) ne formule pas, en soi, une demande régulière de déclaration. On n'y réclame aucune déclaration concernant des droits ou obligations qui incomberaient aux parties à l'instance. La déclaration se rapporte au défaut de tenir une audience ou à tout le moins «une audience complète et équitable» sans référence à aucun droit ni obligation prévu par la loi ou autrement et incombant aux parties. La déclaration demandée aurait dû viser implicitement l'invalidité alléguée des deux décrets adoptés par le gouverneur en conseil à la requête des intimées, et je me propose de statuer sur ce pourvoi en tenant pour acquis que la demande de redressement est formulée en ce sens.

Comme je l'ai dit, il faut tenir tous les faits allégués dans la déclaration pour avérés. Sur une requête comme celle-ci, un tribunal doit rejeter l'action ou radier une déclaration du demandeur seulement dans les cas évidents et lorsqu'il est convaincu qu'il s'agit d'un cas «au-delà de tout doute»: *Ross v. Scottish Union and National Insurance Co.*² En l'espèce, dans sa défense, Bell Canada a soulevé une question de droit: quelle est la position du gouverneur en conseil lorsqu'il agit

² (1920), 47 O.L.R. 308 (Div. App.).

acting under s. 64 of the *National Transportation Act, supra*, and the power and jurisdiction of the court in relation thereto. The issue so raised requires for its disposition neither additional pleadings nor any evidence. I therefore agree with respect with the judge of first instance that it is a proper occasion for a court to respond in the opening stages of the action to such an issue as this application raises.

The defendants other than Bell Canada comprise the occupant of the office of the Governor General of Canada at the time of the commencement of these proceedings and the then members of the federal Cabinet, collectively described in the style of cause as the Governor in Council. I note that the term is defined in the *Interpretation Act*, R.S.C. 1970, c. I-23, s. 28 in the following way:

"Governor in Council", or "Governor General in Council" means the Governor General of Canada, or person administering the Government of Canada for the time being, acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada.

The more traditional procedure has been to join only the Attorney General of Canada as a party representing the Governor in Council. Exception was taken to the particular procedure in the motion for dismissal but the learned trial judge did not find it necessary to refer to the matter because he dismissed the action; and the Federal Court of Appeal did not deal with it. Because of the disposition I shall propose, the matter does not require an answer to the second request in the appellant's application wherein the applicant asks that the claim be struck out as against all named defendants other than the Attorney General of Canada.

The CRTC proceedings concerned the application by Bell Canada for approval under s. 320 of the *Railway Act, supra*, of those telephone tolls proposed to be charged by Bell Canada for its services in areas including the Northwest Territories. Section 321(1) of the *Railway Act, supra*, requires that "all tolls shall be just and reasonable . . .". Subsection (2) prohibits "unjust discrimination" and subs. (3) authorizes the CRTC to determine "as a question of fact" whether or not there has been unjust discrimination or unreasonable

en vertu de l'art. 64 de la *Loi nationale sur les transports*, précitée, et en quoi consistent le pouvoir et la compétence du tribunal à cet égard? Aucune plaidoirie additionnelle ni aucune preuve ne sont nécessaires pour trancher cette question. Par conséquent, je souscris à l'opinion du juge de première instance selon laquelle il s'agit d'un cas où le tribunal peut à bon droit trancher pareille question au stade préliminaire de l'action.

Les défendeurs, autre que Bell Canada, comprennent le gouverneur général du Canada en fonction à l'époque où ces procédures ont été instituées et les membres du Cabinet fédéral de l'époque, appelés collectivement dans l'intitulé le gouverneur en conseil. Cette expression est définie comme suit dans la *Loi d'interprétation*, S.R.C. 1970, chap. I-23, art. 28:

«gouverneur en conseil» ou «gouverneur général en conseil» désigne le gouverneur général du Canada ou la personne exerçant alors le gouvernement du Canada, agissant sur et avec l'avis du Conseil privé de la Reine pour le Canada, ou sur et avec l'avis et du consentement dudit Conseil ou de concert avec ce dernier.

La procédure habituelle consiste à ne joindre que le procureur général du Canada comme partie représentant le gouverneur en conseil. On s'est opposé à la procédure suivie dans la demande de rejet, mais le juge de première instance n'a pas estimé nécessaire de traiter de cette question parce qu'il a rejeté l'action; la Cour d'appel fédérale n'en a pas parlé. Vu la conclusion à laquelle j'arrive, il n'est pas nécessaire de répondre à la seconde demande du requérant qui sollicite la radiation de la déclaration à l'égard de tous les défendeurs sauf du procureur général du Canada.

Les audiences du CRTC portaient sur la demande présentée par Bell Canada conformément à l'art. 320 de la *Loi sur les chemins de fer*, précitée, pour faire approuver les taxes de téléphone qu'elle se propose d'exiger pour ses services dans certaines régions dont les territoires du Nord-Ouest. Le paragraphe 321(1) de la *Loi sur les chemins de fer*, précitée, dispose que «toutes les taxes doivent être justes et raisonnables . . .». Le paragraphe (2) interdit la «discrimination injuste» et le par. (3) autorise le CRTC à déterminer

preference. The *National Transportation Act*, *supra*, makes further provision for such hearings by the CRTC and for appeals therefrom; and we are here principally concerned with s. 64 of that statute, as amended by R.S.C. 1970 (2nd Supp.), c. 10, s. 65 (Schedule II, Item 32). It provides as follows:

64. (1) The Governor in Council may at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motion, and without any petition or application, vary or rescind any order, decision, rule or regulation of the Commission, whether such order or decision is made *inter partes* or otherwise, and whether such regulation is general or limited in its scope and application; and any order that the Governor in Council may make with respect thereto is binding upon the Commission and upon all parties.

(2) An appeal lies from the Commission to the Federal Court of Appeal upon a question of law, or a question of jurisdiction, upon leave therefor being obtained from that Court upon application made within one month after the making of the order, decision, rule or regulation sought to be appealed from or within such further time as a judge of that Court under special circumstances allows, and upon notice to the parties and the Commission, and upon hearing such of them as appear and desire to be heard; and the costs of such application are in the discretion of that Court.

The foregoing statutes were enacted at a time when the approval of telephone tariffs was a function of the Canadian Transport Commission and its predecessors. By the *Canadian Radio-television and Telecommunications Commission Act*, *supra*, ss. 14, 17 and Schedule Items 2 and 5, the CRTC was assigned these responsibilities with reference to telephones and telegraphs.

The two respondent organizations participated "actively throughout the hearing" (to quote from the statement of claim) in the Bell Canada application "to increase the rates charged to customers". Not being satisfied with the decision of the CRTC, the two respondents had the alternative of appealing to the Federal Court of Appeal on a question of law or jurisdiction (s. 64(2), *supra*) or of filing a petition with the Governor in

«comme question de fait» s'il y a eu ou non une discrimination injuste ou une préférence déraisonnable. La *Loi nationale sur les transports*, précitée, contient des dispositions supplémentaires concernant la tenue des audiences du CRTC et les appels formés contre ses décisions; en l'espèce, il faut tout particulièrement s'arrêter à l'art. 64 de cette loi, modifié par S.R.C. 1970 (2^e Supp.), chap. 10, art. 65 (Annexe II, item 32). En voici le texte:

64. (1) Le gouverneur en conseil peut à toute époque, à sa discrétion, soit à la requête d'une partie, personne ou compagnie intéressée, soit de son propre mouvement et sans aucune requête ni demande à cet égard, modifier ou rescinder toute ordonnance, décision, règle ou règlement de la Commission, que cette ordonnance ou décision ait été rendue *inter partes* ou autrement, et que ce règlement ait une portée et une application générales ou restreintes; et tout décret que le gouverneur en conseil prend à cet égard lie la Commission et toutes les parties.

(2) Les décisions de la Commission sont susceptibles d'appel à la Cour d'appel fédérale sur une question de droit ou une question de compétence, quand une autorisation à cet effet a été obtenue de ladite Cour sur demande faite dans le délai d'un mois après que l'ordonnance, l'arrêt ou le règlement dont on veut appeler a été établi, ou dans telle autre limite de temps que le juge permet dans des circonstances spéciales, après avis aux parties et à la Commission, et après audition de ceux des intéressés qui comparaissent et désirent être entendus; et les frais de cette demande sont à la discrétion de ladite Cour.

Ces lois ont été adoptées à l'époque où l'approbation des tarifs relevait de la Commission canadienne des transports et de ses prédécesseurs. La *Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes*, précitée, art. 14, 17 et items 2 et 5 de l'Annexe, a confié ces responsabilités au CRTC en ce qui concerne le téléphone et le télégraphe.

Les deux organisations intimées ont [TRADUCTION] «participé activement aux audiences» (je cite la déclaration) relative à la demande de Bell Canada «visant à augmenter les tarifs exigés des clients». Mécontentes de la décision du CRTC, les deux intimées avaient le choix d'interjeter appel à la Cour d'appel fédérale sur une question de droit ou de compétence (par. 64(2), précité) ou de présenter une requête au gouverneur en conseil lui

Council "to set aside the relevant portion of the decision of the CRTC and to substitute its own order therefor" (to quote from para. 6 of the statement of claim). The respondents elected to follow the latter course. The record does not reveal the contents of the respondents' petition and arguments, if any, in support of their application to the Governor in Council. Paragraph 10 of the claim asserts, and I treat it for the purposes of these proceedings as factually correct, that the Governor in Council received recommendations from the Minister of Communications, together with evidence and argument in support; evidence, opinions, and recommendations from the CRTC; reports from officials of the Department of Communications; and the reply of Bell Canada to each of the respondents' petitions. The respondents did not receive from the Governor in Council the contents of the recommendations and the material described in para. 10 of the claim, *supra*, but apparently did receive a copy of the Bell Canada reply to the petition. The Governor in Council denied the petitions of the respondents before the respondents had filed their respective responses to Bell Canada. According to the allegations made in the statement of claim, the Governor in Council did not communicate to the respondents the substance of the material received from the Minister and other sources mentioned above and did not invite and consequently did not receive the respondents' comments on such material. No oral hearing occurred in the sense of a session at which the Governor in Council heard the petitioners and the various respondents, and indeed the respondents do not insist that such a procedure is prescribed by law and do not now press for an 'oral' hearing. Before this Court the respondents' position was principally founded on the failure of the Governor in Council (a) to receive the actual petitions of the respondents and (b) to afford the respondents the opportunity to respond to the case made against them by the Minister, the departmental officials and the CRTC. To a much lesser extent the respondents objected to the lack of opportunity to answer the response by Bell Canada to the petitions, presumably because the respondents had already encountered at length the arguments and submissions of Bell Canada during the

demandant d'annuler la partie pertinente de la décision du CRTC et d'y substituer son propre décret» (par. 6 de la déclaration). Les intimées ont choisi la seconde voie. Le contenu de la requête des intimées et leurs arguments à l'appui de la demande qu'elles ont adressée au gouverneur en conseil, ne se trouvent pas au dossier. Le paragraphe 10 de la déclaration affirme, et aux fins de ces procédures je considère ces faits comme exacts, que le gouverneur en conseil a reçu des recommandations du ministre des Communications, de même que des dépositions et arguments à leur appui; des dépositions, avis et recommandations du CRTC; des rapports de fonctionnaires du ministère des Communications; et la réponse de Bell Canada aux requêtes de chaque intimée. Les intimées n'ont pas reçu du gouverneur en conseil le contenu des recommandations ni les documents énumérés au paragraphe 10 de la déclaration, précité, mais elles ont apparemment reçu une copie de la réponse de Bell Canada à la requête. Le gouverneur en conseil a rejeté les requêtes des intimées avant qu'elles n'aient pu déposer leurs répliques respectives à Bell Canada. Selon la déclaration, le gouverneur en conseil n'a pas communiqué aux intimées la substance des documents reçus du Ministre et des autres sources mentionnées, il ne les a pas invitées à les commenter et, par conséquent, n'a reçu aucun commentaire de leur part. Il n'y a pas eu d'audition orale, c'est-à-dire de rencontre où le gouverneur en conseil aurait entendu les requérantes et les diverses intimées, et d'ailleurs les intimées ne prétendent pas qu'il faut en droit suivre cette procédure et n'insistent pas pour qu'il y ait une audition «orale». La position des intimées devant cette Cour est fondée principalement sur l'omission du gouverneur en conseil a) de recevoir les requêtes des intimées et b) de donner aux intimées la possibilité de contester les arguments que le Ministre, les fonctionnaires de son ministère et le CRTC ont avancés contre elles. Les intimées se sont élevées, mais avec beaucoup moins d'insistance, contre l'impossibilité dans laquelle on les a placées d'opposer une réplique à la réponse de Bell Canada aux requêtes, probablement parce qu'elles avaient déjà affronté tous les arguments et prétentions de Bell Canada au cours des audiences devant le CRTC et avaient sûrement prévu quelle

CRTC hearings and had no doubt anticipated Bell Canada's position in their respective petitions to the Governor in Council.

In support of these objections to the course followed by the Governor in Council the respondents submit:

- (a) that the Governor in Council acting under s. 64 is a quasi-judicial body or at least owes the respondents a duty of fairness;
- (b) the duty includes disclosure to the respondent of submissions received from the CRTC;
- (c) the respondents have the right to answer Bell Canada if it has introduced some new aspect or submission;
- (d) the very minimum requirement is that the actual written submissions of the petitioners (respondents) must be placed before the Council and not a summary thereof prepared by officials;
- (e) the Governor in Council is required by s. 64 to give notice to all "parties" even if it moves on its own initiative (as the subsection authorizes it to do) so as to give prior notice to all those who may be affected by the rules to be established by the Governor in Council.

I turn then to the wording of s. 64 itself. This provision finds its roots in the *Railway Act, 1868*, 31 Vict., c. 68, subss. 12(9) and 12(10), which gave to the Governor in Council the power to approve rates and tariffs for the haulage of freight by rail. In 1903 the task was given to the Board of Railway Commissioners. Section 64 assumed its present form in the *Railway Act, 1903*, 3 Edw. VII, c. 58, s. 44. All these statutes related to railway rates in the first instance and eventually were extended to cover telephone and telegraph rates. In the meantime provision had been made for telephone rates and charges in the private statutes of incorporation of the Bell Telephone Company of Canada, for example the 1892 *Bell Telephone Company of Canada Act*, 55-56 Vict., c. 67, s. 3:

The existing rates shall not be increased without the consent of the Governor in Council.

serait la position de Bell à l'égard de leurs requêtes respectives au gouverneur en conseil.

A l'appui de leurs oppositions à la procédure suivie par le gouverneur en conseil, les intimées allèguent que:

- a) le gouverneur en conseil, lorsqu'il agit en vertu de l'art. 64, est un organisme quasi judiciaire ou a au moins l'obligation d'agir équitablement envers les intimées;
- b) cette obligation emporte celle de communiquer aux intimées les mémoires reçus du CRTC;
- c) les intimées ont le droit de répondre à Bell Canada si celle-ci fait valoir un point de vue ou un argument nouveau;
- d) il faut à tout le moins présenter au conseil le texte même des mémoires des requérantes (intimées) et non un résumé de ceux-ci rédigé par des fonctionnaires;
- e) le gouverneur en conseil doit, en vertu de l'art. 64, aviser toutes les «parties», même s'il agit de son propre mouvement (ce que l'article l'autorise à faire), de façon à donner un préavis à tous ceux que les règles qu'il va édicter sont susceptibles de toucher.

1980 CanLII 21 (SCC)

J'en viens au texte de l'art. 64. Cette disposition découle de *L'acte des chemins de fer, 1868*, 31 Vict., chap. 68 dont les par. 12(9) et 12(10) ont conféré au gouverneur en conseil le pouvoir d'approuver les taux et tarifs de transport de marchandises par rail. En 1903, cette responsabilité a été confiée à la Commission des chemins de fer pour le Canada. L'article 64 a pris sa forme actuelle dans l'*Acte des chemins de fer, 1903*, 3 Edw. VII, chap. 58, art. 44. Toutes ces lois visaient d'abord les tarifs de chemins de fer et ont ensuite été étendues de façon à s'appliquer aux tarifs de téléphone et de télégraphe. Entre temps, les lois privées qui ont constitué la Compagnie canadienne de téléphone Bell, par exemple l'*Acte concernant la Compagnie canadienne de téléphone Bell* de 1892, 55-56 Vict., chap. 67, art. 3 ont édicté des dispositions visant les tarifs de téléphone:

Les tarifs actuels ne seront pas élevés sans le consentement du Gouverneur en conseil.

In its present state, s. 64 creates a right of appeal on questions of "law or jurisdiction" to the Federal Court of Appeal and an unlimited or unconditional right to petition the Governor in Council to "vary or rescind" any "order, decision, rule or regulation" of the Commission. These avenues of review by their terms are quite different. The Governor in Council may vary any such order on his own initiative. The power is not limited to an order of the Commission but extends to its rules or regulations. The review by the Governor in Council is not limited to an order made by the Commission *inter partes* or to an order limited in scope. It is to be noted at once that following the grant of the right of appeal to the Court in subs. (2), there are five subsections dealing with the details of an appeal to the Court. There can be found in s. 64 nothing to qualify the freedom of action of the Governor in Council, or indeed any guidelines, procedural or substantive, for the exercise of its functions under subs. (1).

The substance of the question before this Court in this appeal is this: is there a duty to observe natural justice in, or at least a lesser duty of fairness incumbent on, the Governor in Council in dealing with parties such as the respondents upon their submission of a petition under s. 64(1)? It will be convenient first to consider briefly the nature of the duty to be fair in our law.

It has been said by Lord Reid in *Wiseman v. Borneman*³, at p. 308:

Natural justice requires that the procedures before any tribunal which is acting judicially shall be fair in all the circumstances.

Such a broad statement depends for its validity upon the meaning to be ascribed to "any tribunal", and to the terms of its parent statute. This Court was concerned with such matters in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police and the Attorney General for Ontario*⁴. A probationary constable was dismissed without being told why his services were being dispensed with and without being given an oppor-

Dans sa forme actuelle, l'art. 64 crée un droit d'appel à la Cour d'appel fédérale sur des questions de «droit ou ... de compétence» et un droit illimité ou inconditionnel de demander par requête au gouverneur en conseil de «modifier ou rescinder» toute «ordonnance, décision, règle ou règlement» du Conseil. Les modalités de ces deux voies de révision sont très différentes. Le gouverneur en conseil peut modifier toute ordonnance de son propre mouvement. Ce pouvoir n'est pas limité à une ordonnance du Conseil mais s'étend à ses règles ou règlements. La révision par le gouverneur en conseil n'est pas limitée à une ordonnance rendue par le Conseil *inter partes* ou à une ordonnance de portée limitée. Il faut noter dès maintenant qu'à la suite du par. (2), qui octroie le droit d'appel à la Cour fédérale, se trouvent cinq dispositions qui en règlent les détails. Rien dans l'art. 64 ne restreint la liberté d'action du gouverneur en conseil, il ne formule même pas de principe, de fond ou de procédure, concernant l'exercice de ses fonctions en vertu du par. (1).

Le fond de la question soumise à la Cour dans ce pourvoi est de savoir si le gouverneur en conseil a l'obligation d'observer les règles de justice naturelle ou, du moins, l'obligation moindre d'agir équitablement lorsqu'il examine une requête que des parties comme les intimées ont présentée en vertu du par. 64(1). Il convient d'examiner d'abord brièvement la nature de l'obligation d'agir équitablement dans notre droit.

Lord Reid a dit, dans l'arrêt *Wiseman v. Borneman*³, à la p. 308:

[TRADUCTION] La justice naturelle exige que la procédure appliquée devant toute autorité agissant à titre judiciaire soit équitable en toutes circonstances.

La validité d'un énoncé aussi général dépend du sens que l'on donne à l'expression «toute autorité» et aux termes de la loi qui crée cette autorité. Cette Cour a été saisie de ces questions dans l'affaire *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police et le procureur général de l'Ontario*⁴. Un agent de police stagiaire avait été destitué sans qu'on lui dise pourquoi on mettait fin à son emploi et sans

³ [1971] A.C. 297.

⁴ [1979] 1 S.C.R. 311.

³ [1971] A.C. 297

⁴ [1979] 1 R.C.S. 311.

tunity to respond or to defend his position. In the result the majority decision of this Court required in those circumstances that the probationary constable should have been treated fairly, not arbitrarily, even though he was not entitled to all the procedural protection accorded to a full constable. The Chief Justice writing for the majority stated at p. 325:

What rightly lies behind this emergence is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question.

The essence of the decision is found in the Chief Justice's remarks at p. 328:

In my opinion, the appellant should have been told why his services were no longer required and given an opportunity, whether orally or in writing as the Board might determine, to respond. The Board itself, I would think, would wish to be certain that it had not made a mistake in some fact or circumstance which it deemed relevant to its determination. Once it had the appellant's response, it would be for the Board to decide on what action to take, without its decision being reviewable elsewhere, always premising good faith. Such a course provides fairness to the appellant, and it is fair as well to the Board's right, as a public authority to decide, once it had the appellant's response, whether a person in his position should be allowed to continue in office to the point where his right to procedural protection was enlarged. Status in office deserves this minimal protection, however brief the period for which the office is held.

The House of Lords in the earlier decision of *Pearlberg v. Varty*⁵, had in effect found a presumption that the rules of natural justice apply to a tribunal entrusted with judicial or quasi-judicial functions but that no such presumption arises where the body is charged with administrative or executive functions. In the latter case courts will

qu'il ait eu la possibilité de se défendre. Finalement, cette Cour, à la majorité, a exigé dans les circonstances que l'agent de police stagiaire soit traité équitablement, et non arbitrairement, même s'il n'avait pas droit à toute la protection de la procédure prévue pour un agent de police confirmé. Le Juge en chef, au nom de la majorité, a dit à la p. 325:

L'apparition de cette notion résulte de la constatation qu'il est souvent très difficile, sinon impossible, de répartir les fonctions créées par la loi dans les catégories judiciaire, quasi judiciaire ou administrative; de plus il serait injuste de protéger certains au moyen de la procédure tout en la refusant complètement à d'autres lorsque l'application des décisions prises en vertu de la loi entraîne les mêmes conséquences graves pour les personnes visées, quelle que soit la catégorie de la fonction en question.

Le cœur de la décision se trouve dans les remarques du Juge en chef à la p. 328:

A mon avis, on aurait dû dire à l'appelant pourquoi on avait mis fin à son emploi et lui permettre de se défendre, oralement ou par écrit au choix du comité. Il me semble que le comité lui-même voudrait s'assurer qu'il n'a commis aucune erreur quant aux faits ou circonstances qui ont déterminé sa décision. Une fois que le comité a obtenu la réponse de l'appelant, il lui appartient de décider de la mesure à prendre, sans que sa décision soit soumise à un contrôle ultérieur, la bonne foi étant toujours présumée. Ce processus est équitable envers l'appelant et fait également justice au droit du comité, en sa qualité d'autorité publique, de décider, lorsqu'il connaît la réponse de l'appelant, si l'on doit permettre à une personne dans sa situation de rester en fonction jusqu'au moment où la procédure lui offrira une plus grande protection. Le titulaire d'une charge mérite cette protection minimale, même si son entrée en fonction est très récente.

Dans l'arrêt antérieur *Pearlberg v. Varty*⁵, la Chambre des lords a conclu à une présomption que les règles de justice naturelle s'appliquent à un tribunal qui exerce des fonctions judiciaires ou quasi judiciaires, mais que pareille présomption n'existe pas lorsque l'organisme exerce des fonctions administratives ou exécutives. Dans ce der-

⁵ [1972] 1 W.L.R. 534.

⁵ [1972] 1 W.L.R. 534.

act on the presumption that Parliament had not intended to act unfairly and will "in suitable cases" imply an obligation in the body or person to act with fairness. See Lord Pearson at p. 547. Lord Hailsham L.C., combining the idea of fairness and natural justice, put it this way at p. 540:

The doctrine of natural justice has come in for increasing consideration in recent years and the courts generally, and your Lordships' House in particular, have, I think rightly, advanced its frontiers considerably. But at the same time they have taken an increasingly sophisticated view of what it requires in individual cases.

Tucker L.J., thirty years earlier, came closer to our situation in this appeal when he said in *Russell v. Duke of Norfolk*⁶, at p. 118:

The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.

The arena in which the broad rules of natural justice arose and the even broader rule of fairness now performs is described by Lord Denning M.R. in *Selvarajan v. Race Relations Board*⁷ where His Lordship, after enumerating a number of authorities dealing with tribunals generally concerned with a *lis inter partes* in a variety of administrative fields, said at p. 19:

In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case

nier cas, les tribunaux tiendront pour acquis que le législateur n'avait pas l'intention d'agir d'une façon inéquitable et, «dans les cas appropriés», ils suggéreront que l'organisme ou la personne agisse équitablement. Voir lord Pearson à la p. 547. Le lord chancelier Hailsham, combinant l'idée d'équité et celle de justice naturelle, s'est exprimé ainsi à la p. 540:

[TRADUCTION] On a accordé une importance accrue aux principes de justice naturelle ces dernières années et les tribunaux en général, et la Chambre de vos Seigneuries en particulier, en ont à bon droit à mon avis considérablement repoussé les frontières. Mais dans un même temps, ils ont continuellement raffiné les critères d'application dans chaque cas.

Le lord juge Tucker, trente ans plus tôt, était plus proche de la situation en l'espèce lorsqu'il a dit dans l'arrêt *Russell v. Duke of Norfolk*⁶, à la p. 118:

[TRADUCTION] Les exigences de la justice naturelle doivent varier selon les circonstances de l'affaire, la nature de l'enquête, les règles qui régissent le tribunal, la question traitée, etc. Par conséquent, les définitions de la justice naturelle qui ont été formulées à l'occasion ne me sont pas très utiles; cependant, quelque critère que l'on adopte, il est essentiel que la personne en cause ait une possibilité raisonnable de faire valoir ses arguments.

Le théâtre où sont nées les règles larges de justice naturelle et où la règle encore plus large d'équité s'applique maintenant, est décrit par le maître des rôles lord Denning dans l'arrêt *Selvarajan v. Race Relations Board*⁷, après avoir énuméré plusieurs décisions relatives aux tribunaux qui entendent habituellement des litiges entre particuliers dans plusieurs domaines de nature administrative, sa Seigneurie a dit à la p. 19:

[TRADUCTION] Dans tous ces cas, on a jugé que l'organisme chargé d'enquêter a le devoir d'agir équitablement; mais les exigences de l'équité dépendent de la nature de l'enquête et de ses conséquences pour les personnes en cause. La règle fondamentale est que dès qu'on peut infliger des peines ou sanctions à une personne ou qu'on peut la poursuivre ou la priver de recours, de redressement ou lui faire subir de toute autre manière un préjudice en raison de l'enquête et du rap-

⁶ [1949] 1 All E.R. 109.

⁷ [1976] 1 All E.R. 12.

⁶ [1949] 1 All E.R. 109.

⁷ [1976] 1 All E.R. 12.

made against him and be afforded a fair opportunity of answering it.

(Even in those instances the Court went on to add that such a body may adopt its own procedure, can employ staff for all preliminary work, but in the end must come to its own decision.)

Let it be said at the outset that the mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond review. If that body has failed to observe a condition precedent to the exercise of that power, the court can declare that such purported exercise is a nullity. In *Wilson v. Esquimalt and Nanaimo Railway Company*⁸, for example, the Privy Council considered the position of the Lieutenant-Governor of British Columbia under the *Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917*, S.B.C. 1917, c. 71. The effectiveness of a Crown land grant issued by order of the Lieutenant-Governor in Council was contested on the grounds that the Lieutenant-Governor in Council had no "reasonable proof" before them that the grantees had improved the lands in question or occupied them with an intention to reside thereon. The Court of Appeal found that there was no such evidence and hence declared the Order in Council to be void. The Privy Council proceeded on the basis that before the Lieutenant-Governor in Council could make the grant in question, it must determine that the statutorily prescribed conditions had been met by the applicant for the grant. As here, the allegation was made that the owners did not have "an adequate opportunity" to show that there was no factual foundation for the grant made by the Lieutenant-Governor in Council. The Privy Council found against this submission stating at p. 213 through Duff J., sitting as a member of the Board:

The respondents were given the fullest opportunity to present before the Lieutenant-Governor in Council everything they might to urge against the view that the depositions produced in themselves constituted "reasonable proof," and they had the fullest opportunity also of supporting their contention that the depositions alone, in

port, il faut l'informer de la nature de la plainte et lui permettre d'y répondre.

(La Cour a ajouté que, même dans ces cas, l'organisme enquêteur peut adopter ses propres règles de procédure, confier tout le travail préliminaire à des employés, mais il doit en dernier ressort arrêter sa propre décision.)

Il faut dire tout de suite que la simple attribution par la loi d'un pouvoir au gouverneur en conseil ne signifie pas que son exercice échappe à toute révision. Si ce corps constitué n'a pas respecté une condition préalable à l'exercice de ce pouvoir, la cour peut déclarer ce prétendu exercice nul. Dans l'arrêt *Wilson v. Esquimalt and Nanaimo Railway Company*⁸, par exemple, le Conseil privé s'est penché sur la situation du lieutenant-gouverneur de la Colombie-Britannique sous le régime de la *Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917*, S.B.C. 1917, chap. 71. La validité de la concession d'une terre de la Couronne consentie par décret du lieutenant-gouverneur en conseil était contestée pour le motif que l'on n'avait soumis au lieutenant-gouverneur en conseil aucune «preuve raisonnable» que les concessionnaires avaient amélioré les terres en cause ou les avaient occupées avec l'intention d'y habiter. La Cour d'appel a conclu que l'on n'avait pas fait cette preuve et a par conséquent déclaré le décret nul. Le Conseil privé a pris comme point de départ qu'avant de pouvoir consentir la concession en cause, le lieutenant-gouverneur en conseil devait décider si le requérant avait rempli les conditions prescrites par la Loi. Comme en l'espèce, on a allégué que les propriétaires n'avaient pas eu une «possibilité suffisante» de démontrer que la concession consentie par le lieutenant-gouverneur en conseil n'avait pas de fondement dans les faits. Le Conseil privé a rejeté cet argument par la voix du juge Duff qui siégeait comme membre du Comité (à la p. 213):

[TRADUCTION] Les intimés ont eu amplement la possibilité de présenter au lieutenant-gouverneur en conseil tout ce qu'ils pouvaient faire valoir pour contrer l'opinion selon laquelle les dépositions constituaient en elles-mêmes une «preuve raisonnable» et ont eu amplement la possibilité aussi de faire valoir leur prétention que les

⁸ [1922] 1 A.C. 202.

⁸ [1922] 1 A.C. 202.

the absence of cross-examination, ought not to be considered sufficient, and that further time should be allowed to enable them to prepare their case. The appointed authority for dealing with the matter, it must be remembered, was the Executive Government of the Province directly answerable to the Legislature, and their Lordships agree without hesitation with the majority of the Court of Appeal in holding as they explicitly decided upon the same facts in Dunlop's case, that the Lieutenant-Governor in Council was not bound to govern himself by the rules of procedure regulating proceedings in a Court of justice.

It cannot be suggested that he proceeded without any regard to the rights of the respondents and the procedure followed must be presumed, in the absence of some conclusive reason to the contrary, to have been adopted in exercise of his discretion under the statute as a proper mode of discharging the duty entrusted to him. His decisions taken in the exercise of that discretion are, in their Lordships' opinion, final and not reviewable in legal proceedings.

The Privy Council also determined in the case that factual issues, including the "reasonableness" or "sufficiency" of the evidence, were exclusively for the Lieutenant-Governor whose decision would not be reviewable by a court if there was "some evidence in support of the application" (*per* Duff J. at p. 213).

The Ontario Court of Appeal was concerned with similar issues in *Border Cities Press Club v. Attorney General for Ontario*⁹. The factual differences are such that it affords no direct assistance here. The statute prescribed conditions precedent to the exercise of the powers granted by the Legislature to the Lieutenant-Governor in Council in that "sufficient cause must be shown" before the letters patent in question might be cancelled. The trial court found that an unreasonable request had been made to the applicant by the province, no hearing or opportunity was afforded the applicant, and indeed no notice of the impending cancellation of the charter was given by the Lieutenant-Governor in Council. The Court of Appeal set aside the declaration that the Order in Council was void for procedural reasons applicable to the powers of the court of the first instance and for reasons not here

dépositions seules, sans contre-interrogatoire, ne devaient pas suffire et qu'on devait leur accorder plus de temps pour préparer leurs arguments. Il faut se rappeler que l'autorité désignée pour disposer de la question était le pouvoir exécutif du gouvernement de la province, directement responsable devant la Législature; leurs Seigneuries partagent sans hésitation l'opinion de la majorité de la Cour d'appel et statuent, comme elles l'ont explicitement décidé sur la base des mêmes faits dans l'affaire Dunlop, que le lieutenant-gouverneur en conseil n'était pas tenu de respecter les règles de procédure régissant les procès devant une cour de justice.

On ne peut laisser entendre qu'il a procédé sans tenir compte des droits des intimés et il faut présumer, en l'absence de quelque motif concluant à l'effet contraire, que la procédure suivie a été adoptée dans l'exercice du pouvoir discrétionnaire que lui confère la Loi, comme la façon appropriée d'accomplir le devoir qui lui était confié. Les décisions prises dans l'exercice de son pouvoir discrétionnaire, de l'avis de leurs Seigneuries, sont finales et échappent au contrôle judiciaire.

Le Conseil privé a également décidé dans cet arrêt que les questions de fait, y compris le caractère «raisonnable» ou «suffisant» de la preuve, relèvent exclusivement du lieutenant-gouverneur dont la décision échappe au contrôle judiciaire s'il y a [TRADUCTION] «des éléments de preuve à l'appui de la requête» (le juge Duff à la p. 213).

La Cour d'appel de l'Ontario a été saisie de questions analogues dans *Border Cities Press Club v. Attorney General for Ontario*⁹. Cet arrêt ne nous est pas particulièrement utile dans ce pourvoi vu les différences importantes entre les faits. La Loi prescrivait des conditions préalables à l'exercice des pouvoirs conférés par la Législature au lieutenant-gouverneur en conseil, savoir que [TRADUCTION] «il faut démontrer une cause suffisante» avant que les lettres patentes en litige puissent être annulées. Le tribunal de première instance a conclu que ce que la province avait exigé du requérant était déraisonnable, qu'on ne lui avait pas donné la possibilité de se faire entendre et qu'en fait le lieutenant-gouverneur en conseil n'avait donné aucun avis de l'annulation imminente de la charte. La Cour d'appel a annulé la déclaration portant que le décret était nul pour

⁹ [1955] 1 D.L.R. 404.

⁹ [1955] 1 D.L.R. 404.

relevant, but in doing so stated through Pickup C.J.O. at p. 412:

I agree with the learned Judge in Weekly Court, for the reasons stated by him, that the power conferred is conditional upon sufficient cause being shown, and that without giving the respondent an opportunity of being heard, or an opportunity to show cause why the letters patent should not be forfeited, the Lieutenant-Governor in Council would not have jurisdiction under the statute to make the order complained of. In exercising the power referred to, the Lieutenant-Governor in Council is not, in my opinion, exercising a prerogative of the Crown, but a power conferred by statute, and such a statutory power can be validly exercised only by complying with statutory provisions which are, by law, conditions precedent to the exercise of such power.

It may be of interest to note that in approving the observations of the court below with respect to the statutory powers granted to the Lieutenant-Governor in Council, no express approval was given to the comment by the learned Judge in Weekly Court that in performing his function under the statute the Lieutenant-Governor in Council was required to act judicially.

However, no failure to observe a condition precedent is alleged here. Rather it is contended that, once validly seized of the respondents' petition, the Governor in Council did not fulfill the duty to be fair implicitly imposed upon him, the argument goes, by s. 64(1) of the *National Transportation Act*. While, after *Nicholson, supra*, and *Martineau v. Matsqui Institution (No. 2)*¹⁰, (decision of this Court handed down December 13, 1979) the existence of such a duty no longer depends on classifying the power involved as "administrative" or "quasi-judicial", it is still necessary to examine closely the statutory provision in question in order to discern whether it makes the decision-maker subject to any rules of procedural fairness.

¹⁰ [1980] 1 S.C.R. 602.

des motifs de procédure relatifs à la compétence du tribunal de première instance et d'autres motifs qui ne sont pas pertinents en l'espèce, mais, ce faisant, le juge Pickup, juge en chef de l'Ontario, a dit à la p. 412:

[TRADUCTION] Je suis d'accord avec le savant juge de la Cour des sessions hebdomadaires, pour les motifs qu'il a énoncés, que le pouvoir conféré existe seulement si une cause suffisante d'action a été démontrée, et que le lieutenant-gouverneur en conseil ne devrait pas avoir compétence, en vertu de la loi, de rendre le décret contesté sans accorder à l'intimé l'occasion de se faire entendre ou d'exposer les raisons pour lesquelles les lettres patentes ne devraient pas être annulées. En exerçant le pouvoir mentionné, le lieutenant-gouverneur en conseil, n'exerce pas, à mon avis, une prérogative de la Couronne, mais bien un pouvoir attribué par la Loi, pouvoir qui ne peut valablement être exercé qu'en se conformant aux dispositions de la Loi qui sont juridiquement des conditions préalables à l'exercice d'un tel pouvoir.

Il peut être intéressant de souligner qu'en approuvant les remarques du tribunal de première instance concernant les pouvoirs que la Loi confère au lieutenant-gouverneur en conseil, la Cour d'appel n'a pas approuvé explicitement l'opinion du savant juge de la Cour des sessions hebdomadaires selon laquelle le lieutenant-gouverneur en conseil, dans l'exercice de la fonction que lui confie la Loi, a l'obligation d'agir d'une façon judiciaire.

En l'espèce, cependant, on n'allègue pas la violation d'une condition préalable. On prétend plutôt qu'une fois que la requête des intimées lui a été valablement soumise, le gouverneur en conseil n'a pas rempli l'obligation d'agir équitablement que lui impose implicitement, selon les intimées, le par. 64(1) de la *Loi nationale sur les transports*. Bien que, depuis les arrêts *Nicholson*, précité, et *Martineau c. L'Institution de Matsqui (N° 2)*¹⁰, (arrêt de cette Cour rendu le 13 décembre 1979), l'existence de cette obligation ne soit plus tributaire de la classification du pouvoir en question comme «administratif» ou «quasi judiciaire», il demeure nécessaire d'examiner attentivement la disposition de la Loi pour décider si elle assujettit le décideur à des règles d'équité en matière de procédure.

¹⁰ [1980] 1 R.C.S. 602.

Instructive in this regard is the decision of the Ontario Court of Appeal in *Re Davisville Investment Co. Ltd. and City of Toronto et al.*¹¹, where judicial review of an Order in Council was sought. The applicant had unsuccessfully applied to the Ontario Municipal Board for review of an earlier Board decision. By petition the applicant sought to have the Lieutenant-Governor in Council rescind the earlier Board order and direct a public hearing by the Board "to correct the earlier denial thereof" by the Board. The statute under which the petition was filed provided that the Lieutenant-Governor in Council might confirm, vary or rescind the Board order or require the Board to hold a new hearing. Lacourcière J.A. speaking on behalf of the majority, after describing the alternative provision for appeal to the court on a question of law or jurisdiction, described the petition as "the political route to the Lieutenant-Governor in Council" and went on to state at pp. 555-56:

The petition does not constitute a judicial appeal or review. It merely provides a mechanism for a control by the executive branch of Government applying its perception of the public interest to the facts established before the Board, plus the additional facts before the Council. The Lieutenant-Governor in Council is not concerned with matters of law and jurisdiction which are within the ambit of judicial control. But it can do what Courts will not do, namely, it can substitute its opinion on a matter of public convenience and general policy in the public interest. This is what was done by the Order in Council: if it was done without any error of law, or without defects of a jurisdictional nature, the Divisional Court had no power to interfere and properly dismissed the application before it.

At p. 557 His Lordship returns to the same point:

Section 94 of *The Ontario Municipal Board Act* should not be construed restrictively as if it involved an inferior tribunal to which certain matters have been committed by the Legislature. I prefer to regard the power as one reserved by the legislative to the executive branch of Government acting on broad lines of policy.

¹¹ (1977), 15 O.R. (2d) 553.

L'arrêt de la Cour d'appel de l'Ontario *Re Davisville Investment Co. Ltd. and City of Toronto et al.*¹¹, une affaire où l'on demandait le contrôle judiciaire d'un décret, est instructif sur ce point. La requérante avait demandé en vain à la Commission municipale de l'Ontario de réviser une de ses décisions antérieures. La requérante a, par requête, demandé au lieutenant-gouverneur en conseil d'annuler l'ordonnance antérieure de la Commission et de lui ordonner de tenir une audience publique [TRADUCTION] «pour remédier à son refus antérieur à cet égard». La requête se fondait sur une loi qui autorisait le lieutenant-gouverneur en conseil à confirmer, modifier ou rescinder une ordonnance de la Commission ou d'exiger qu'elle tienne une nouvelle audience. Après avoir décrit la disposition subsidiaire prévoyant l'appel à la cour sur une question de droit ou de compétence, le juge Lacourcière, au nom de la majorité de la Cour d'appel, a décrit la requête comme [TRADUCTION] «la voie politique menant au lieutenant-gouverneur en conseil» et a poursuivi aux pp. 555 et 556:

[TRADUCTION] La requête ne constitue ni une intimation d'appel ni une demande de contrôle judiciaire. Elle ne fait que mettre en marche le mécanisme de contrôle de l'Exécutif qui applique sa vision de l'intérêt public aux faits établis devant le Conseil et aux éléments complémentaires d'information soumis à son propre examen. Le lieutenant-gouverneur en conseil ne connaît pas des questions de droit et de compétence, lesquelles relèvent du contrôle judiciaire. Cependant il peut faire quelque chose qui échappe à la compétence des tribunaux: faire valoir son propre avis sur une question d'utilité et d'ordre publics et ce, dans l'intérêt public. C'est ce qui a été fait au moyen du décret: si celui-ci n'est entaché d'aucune erreur de droit ni d'aucun vice de compétence, la Cour divisionnaire n'avait pas à intervenir et c'est avec raison qu'elle a débouté la demanderesse.

A la p. 557, le juge est revenu sur cette question:

[TRADUCTION] Il ne faut pas donner à l'art. 94 de *The Ontario Municipal Board Act* une interprétation restrictive comme s'il s'agissait d'un tribunal d'instance inférieure auquel le législateur a confié certaines questions. Je préfère considérer qu'il s'agit d'un pouvoir que le législateur a réservé à l'Exécutif du gouvernement

¹¹ (1977), 15 O.R. (2d) 553.

There is no reason to fetter and restrict the scope of the power by a narrow judicial interpretation.

In the *Davisville* proceeding the petition was treated as an appeal in writing and it may be noted that the respondent party filed a reply but no response thereto was made by the applicant. Blair J.A. dissented on the interpretation to be placed upon s. 94 as it related to the alternative courses open on such a petition to the Lieutenant-Governor in Council, but agreed with the majority of the court that the action of the Executive is reviewable only if the Lieutenant-Governor in Council acts outside the terms of the enabling statute.

It is not helpful in my view to attempt to classify the action or function by the Governor in Council (or indeed the Lieutenant-Governor in Council acting in similar circumstances) into one of the traditional categories established in the development of administrative law. The Privy Council in the *Wilson* case, *supra*, described the function of the Lieutenant-Governor as "judicial" as did the judge of first instance in the *Border Cities Press* proceedings, *supra*. However, in my view the essence of the principle of law here operating is simply that in the exercise of a statutory power the Governor in Council, like any other person or group of persons, must keep within the law as laid down by Parliament or the Legislature. Failure to do so will call into action the supervising function of the superior court whose responsibility is to enforce the law, that is to ensure that such actions as may be authorized by statute shall be carried out in accordance with its terms, or that a public authority shall not fail to respond to a duty assigned to it by statute.

I turn now to a consideration of s. 64(1) in light of those principles. Clearly the Governor in Council is not limited to varying orders made *inter partes* where a *lis* existed and was determined by the Commission. The Commission is empowered by s. 321 of the *Railway Act*, *supra*, and the section of the *CRTC Act* already noted to approve all charges for the use of telephones of Bell

agissant conformément à des règles générales d'intérêt public. Rien ne permet de restreindre et d'atténuer la portée du pouvoir par une interprétation judiciaire étroite.

Dans l'affaire *Davisville*, on a considéré la requête comme un appel écrit et on peut noter que l'intimée a déposé une réponse mais que la requérante n'y a pas répliqué. Le juge Blair de la Cour d'appel n'était pas d'accord avec l'opinion de la majorité sur l'interprétation à donner à l'art. 94 pour ce qui est des choix offerts au lieutenant-gouverneur en conseil saisi d'une requête de ce genre, mais il a souscrit à la décision majoritaire de la Cour portant que les actes de l'Exécutif ne peuvent faire l'objet d'un contrôle que si le lieutenant-gouverneur en conseil excède les termes de la loi habilitante.

Il est inutile, à mon avis, d'essayer de classer l'action du gouverneur en conseil ou sa fonction (ou celles du lieutenant-gouverneur en conseil dans des situations semblables) dans l'une des catégories traditionnelles établies en droit administratif. Dans *Wilson*, précité, le Conseil privé a qualifié la fonction du lieutenant-gouverneur de «judiciaire» comme l'a fait le juge de première instance dans *Border Cities Press*, précité. Cependant, à mon avis, l'essentiel du principe de droit applicable en l'espèce est simplement que dans l'exercice d'un pouvoir conféré par la loi, le gouverneur en conseil, comme n'importe quelle autre personne ou groupe de personnes, doit respecter les limites de la loi édictée par le Parlement ou la Législature. Y déroger déclencherait le rôle de surveillance de la cour supérieure qui a la responsabilité de faire appliquer la loi, c'est-à-dire de s'assurer que les actes autorisés par la loi sont accomplis en conformité avec ses dispositions ou qu'une autorité publique ne se dérobe pas à une obligation qu'elle lui impose.

J'en viens maintenant à l'examen du par. 64(1) à la lumière de ces principes. Le pouvoir du gouverneur en conseil n'est manifestement pas limité aux modifications des ordonnances rendues *inter partes* lorsqu'un litige a été tranché par le Conseil. L'article 321 de la *Loi sur les chemins de fer*, précitée, et l'article déjà noté de la *Loi sur le CRTC* autorisent le Conseil à approuver tous les

Canada. In so doing the Commission determines whether the proposed tariff of tolls is just and reasonable and whether they are discriminatory. Thus the statute delegates to the CRTC the function of approving telephone service tolls with a directive as to the standards to be applied. There is thereafter a secondary delegation of the rate-fixing function by Parliament to the Governor in Council but this function only comes into play after the Commission has approved a tariff of tolls; and on the fulfillment of that condition precedent, the power arises in the Governor in Council to establish rates for telephone service by the variation of the order, decision, rule or regulation of the CRTC. While the CRTC must operate within a certain framework when rendering its decisions, Parliament has in s. 64(1) not burdened the executive branch with any standards or guidelines in the exercise of its rate review function. Neither were procedural standards imposed or even implied. That is not to say that the courts will not respond today as in the *Wilson* case *supra*, if the conditions precedent to the exercise of power so granted to the executive branch have not been observed. Such a response might also occur if, on a petition being received by the Council, no examination of its contents by the Governor in Council were undertaken. That is quite a different matter (and one with which we are not here faced) from the assertion of some principle of law that requires the Governor in Council, before discharging its duty under the section, to read either individually or *en masse* the petition itself and all supporting material, the evidence taken before the CRTC and all the submissions and arguments advanced by the petitioner and responding parties. The very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council. The executive branch cannot be deprived of the right to resort to its staff, to departmental personnel concerned with the subject matter, and above all to the comments and advice of ministerial members of the Council who are by virtue of their office concerned with the policy issues arising by reason of the petition whether those policies be economic, political, commercial or of some other nature. Parliament might otherwise ordain, but in s. 64 no such limitation

droits exigés pour l'usage des téléphones de Bell Canada. Ce faisant, le Conseil décide si le tarif de taxes proposé est juste et raisonnable et s'il est discriminatoire. La loi délègue donc au CRTC la fonction d'approuver les taxes pour le service de téléphone, assortie d'une directive sur les critères applicables. Le législateur délègue ensuite au gouverneur en conseil la fonction de fixer les tarifs, mais cette délégation secondaire joue seulement après que le Conseil a approuvé un tarif de taxes; une fois cette condition préalable remplie, le gouverneur en conseil peut exercer son pouvoir de fixer les tarifs pour le service de téléphone en modifiant l'ordonnance, la décision, la règle ou le règlement du CRTC. Alors que le CRTC doit prendre ses décisions dans un certain cadre, le par. 64(1) n'impose pas à l'Exécutif de normes ou de règles applicables à l'exercice de sa fonction de révision des tarifs. Le législateur n'a pas imposé non plus de normes de procédure expresses ou même implicites. Cela ne veut pas dire que les tribunaux ne réagiront pas aujourd'hui comme dans l'arrêt *Wilson*, précité, si les conditions préalables à l'exercice du pouvoir ainsi conféré à l'Exécutif n'ont pas été respectées. La réaction pourrait aussi être la même si le gouverneur en conseil n'examinait pas le contenu d'une requête qui lui est soumise. C'est une question très différente (et ce n'est pas le cas en l'espèce) de l'affirmation qu'un principe de droit exige qu'avant de remplir les obligations conférées par cet article, le gouverneur en conseil lise, soit un à un, soit globalement, la requête elle-même et tous les documents à l'appui, les dépositions faites devant le CRTC et tous les arguments et mémoires soumis par la requérante et les parties opposées. Il faut, dans l'évaluation de la technique de révision adoptée par le gouverneur en conseil, tenir compte de la nature même de ce corps constitué. On ne peut priver l'Exécutif de son droit d'avoir recours à son personnel, aux fonctionnaires du ministère concerné, et surtout aux commentaires et aux avis des ministres membres du conseil, responsables, à ce titre, des questions d'intérêt public soulevées par la requête, que ces questions soient de nature économique, politique, commerciale ou autre. Le législateur pourrait ordonner qu'il en soit autrement, mais l'art. 64 n'impose pas de restriction semblable

had been imposed on the Governor in Council in the adoption of the procedures for the hearing of petitions under subs. (1).

This conclusion is made all the more obvious by the added right in s. 64(1) that the Governor in Council may "of his motion" vary or rescind any rule or order of the Commission. This is legislative action in its purest form where the subject matter is the fixing of rates for a public utility such as a telephone system. The practicality of giving notice to "all parties", as the respondent has put it, must have some bearing on the interpretation to be placed upon s. 64(1) in these circumstances. In these proceedings the respondent challenged the rates established by the CRTC and confirmed in effect by the Governor in Council. There are many subscribers to the Bell Canada services all of whom are and will be no doubt affected to some degree by the tariff of tolls and charges authorized by the Commission and reviewed by the Governor in Council. All subscribers should arguably receive notice before the Governor in Council proceeds with its review. The concluding words of subs. (1) might be said to support this view where it is provided that:

... any order that the Governor in Council may make with respect thereto is binding upon the Commission and upon all parties.

I read these words as saying no more than this: if the nature of the matter before the Governor in Council under s. 64 concerns parties who have been involved in proceedings before the administrative tribunal whose decision is before the Governor in Council by virtue of a petition, all such persons, as well as the tribunal or agency itself, will be bound to give effect to the order in council issued by the Governor in Council upon a review of the petition. Different terminology to the same effect is found in predecessor statutes and I see no basis for reading into this statute any different parliamentary intent from that which I have ascribed to these words as they are found now in s. 64(1).

It was pointed out that in the past the Governor in Council has proceeded by way of an actual oral hearing in which the petitioner and the contending parties participated (P.C. 2166 dated 24/10/23;

au gouverneur en conseil dans l'adoption des règles de procédure pour l'audition de requêtes en vertu du par. (1).

Cette conclusion s'impose d'autant plus que le par. 64(1) autorise en outre le gouverneur en conseil à modifier ou rescinder «de son propre mouvement» une règle ou ordonnance du Conseil. C'est là un acte législatif sous la forme la plus pure qui a pour objet de fixer les tarifs d'un service public tel un réseau téléphonique. L'aspect pratique d'un avis à «toutes les parties» doit, selon les intimées, avoir une incidence sur l'interprétation qu'il faut donner au par. 64(1) dans les circonstances. En l'espèce, les intimées contestent les tarifs fixés par le CRTC et confirmés par le gouverneur en conseil. Bell Canada a de nombreux abonnés qui sont et seront tous certainement touchés jusqu'à un certain point par le tarif de taxes et de frais autorisé par le Conseil et révisé par le gouverneur en conseil. On pourrait soutenir que tous les abonnés devraient être avisés avant que le gouverneur en conseil n'aille de l'avant avec sa révision. On pourrait soutenir que cette interprétation est justifiée par les derniers mots du par. (1) qui disposent:

... tout décret que le gouverneur en conseil prend à cet égard lie la Commission et toutes les parties.

A mon avis, ces mots veulent simplement dire ceci: si la question soumise au gouverneur en conseil en vertu de l'art. 64 est d'une nature telle qu'elle concerne des parties qui ont participé aux procédures devant le tribunal administratif dont la décision est soumise au gouverneur en conseil par une requête, toutes ces personnes, de même que le tribunal ou l'organisme lui-même, seront tenues de donner effet au décret du gouverneur en conseil sur révision de la requête. Les lois antérieures contenaient des dispositions au même effet et rien dans cette loi ne me permet d'y voir une intention du législateur différente de celle que j'ai attribuée à ces termes que l'on trouve maintenant au par. 64(1).

On a fait remarquer qu'il est arrivé que le gouverneur en conseil procède par audition orale à laquelle le requérant et les parties intéressées ont participé. (C.P. 2166 en date du 24/10/23 et C.P.

and P.C. 1170 dated 17/6/27). These proceedings do no more than illustrate the change in growth of our political machinery and indeed the size of the Canadian community. It was apparently possible for the national executive in those days to conduct its affairs under the *Railway Act*, *supra*, through meetings or hearings in which the parties appeared before some or all of the Cabinet. The population of the country was a fraction of that today. The magnitude of government operations bears no relationship to that carried on at the federal level at present. No doubt the Governor in Council could still hold oral hearings if so disposed. Even if a court had the power and authority to so direct (which I conclude it has not) it would be a very unwise and impractical judicial principle which would convert past practice into rigid, invariable administrative procedures. Even in cases mentioned above, while the order recites it to have been issued on the recommendation of the responsible Minister, there is nothing to indicate that the parties were informed of such a recommendation prior to the conduct of the hearing.

While it is true that a duty to observe procedural fairness, as expressed in the maxim *audi alteram partem*, need not be express (*Alliance des Professeurs Catholiques de Montréal v. Commission des Relations Ouvrières de la Province de Québec*¹²), it will not be implied in every case. It is always a question of construing the statutory scheme as a whole in order to see to what degree, if any, the legislator intended the principle to apply. It is my view that the supervisory power of s. 64, like the power in *Davisville*, *supra*, is vested in members of the Cabinet in order to enable them to respond to the political, economic and social concerns of the moment. Under s. 64 the Cabinet, as the executive branch of government, was exercising the power delegated by Parliament to determine the appropriate tariffs for the telephone services of Bell Canada. In so doing the Cabinet, unless otherwise directed in the enabling statute, must be free to consult all sources which Parlia-

1170 en date du 17/06/27). Ce ne sont là que des cas qui illustrent la modification de notre processus politique et, d'ailleurs, la croissance de la société canadienne. L'Exécutif national était apparemment en mesure à cette époque de mener ses affaires en vertu de la *Loi sur les chemins de fer*, précitée, par réunions ou auditions au cours desquelles les parties comparaissaient devant le Cabinet siégeant au complet ou en partie. La population du pays n'était qu'une fraction de ce qu'elle est aujourd'hui. L'étendue des activités gouvernementales de l'époque n'a aucune commune mesure avec celle d'aujourd'hui. Il ne fait aucun doute que le gouverneur en conseil pourrait encore tenir des auditions orales s'il le désirait. Même si un tribunal avait le pouvoir et l'autorité de l'ordonner (et je conclus que ce n'est pas le cas), ce serait là un principe judiciaire très peu sage et peu commode qui transformerait une pratique ancienne en des procédures administratives rigides et inflexibles. Même dans les cas précités, bien que le décret mentionne avoir été pris sur la recommandation du ministre responsable, rien n'indique que les parties ont été informées de cette recommandation avant la tenue de l'audience.

Même s'il est exact que l'obligation de respecter l'équité dans la procédure, qu'exprime la maxime *audi alteram partem*, n'a pas à être expresse (*Alliance des Professeurs Catholiques de Montréal c. Commission des Relations Ouvrières de la Province de Québec*¹²) elle n'est pas implicite dans tous les cas. Il faut toujours considérer l'économie globale de la loi pour voir dans quelle mesure, le cas échéant, le législateur a voulu que ce principe s'applique. Je suis d'avis que le pouvoir de surveillance de l'art. 64, comme celui en cause dans l'arrêt *Davisville*, précité, est conféré aux membres du Cabinet pour leur permettre de répondre aux préoccupations politiques, économiques et sociales du moment. En vertu de l'art. 64, le Cabinet exerce, à titre d'Exécutif du gouvernement, le pouvoir que lui a délégué le législateur de fixer les tarifs appropriés pour le service téléphonique de Bell. Cependant, à moins que la loi habilitante n'en dispose autrement, le Cabinet doit être libre

¹² [1953] 2 S.C.R. 140.

¹² [1953] 2 R.C.S. 140.

ment itself might consult had it retained this function. This is clearly so in those instances where the Council acts on its own initiative as it is authorized and required to do by the same subsection. There is no indication in subs. (1) that a different interpretation comes into play upon the exercise of the right of a party to petition the Governor in Council to exercise this same delegated function or power. The wording adopted by Parliament in my view makes this clear. The Governor in Council may act "at any time". He may vary or rescind any order, decision, rule or regulation "in his discretion". The guidelines mandated by Parliament in the case of the CRTC are not repeated expressly or by implication in s. 64. The function applies to broad, quasi-legislative orders of the Commission as well as to inter-party decisions. In short, the discretion of the Governor in Council is complete provided he observes the jurisdictional boundaries of s. 64(1).

The procedure sanctioned by s. 64(1) has sometimes been criticized as an unjustifiable interference with the regulatory process: see *Independent Administrative Agencies*, Working Paper 25 of the Law Reform Commission of Canada (1980), at pp. 87-89. The Commission recommended that

provisions for the final disposition by the Cabinet or a minister of appeals of any agency decisions except those requesting the equivalent of the exercise of the prerogative of mercy or a decision based on humanitarian grounds, should be abolished. (at p. 88)

Indeed it may be thought by some to be unusual and even counter-productive in an organized society that a carefully considered decision by an administrative agency, arrived at after a full public hearing in which many points of view have been advanced, should be susceptible of reversal by the Governor in Council. On the other hand, it is apparently the judgment of Parliament that this is an area inordinately sensitive to changing public policies and hence it has been reserved for the final application of such a policy by the executive branch of government. Given the interpretation of

de consulter toutes les sources auxquelles le législateur lui-même aurait pu faire appel s'il s'était réservé cette fonction. C'est manifestement le cas lorsque le conseil agit de son propre mouvement comme cette disposition l'autorise à le faire et le lui impose. Rien au par. (1) n'indique qu'il faille adopter une interprétation différente lorsqu'une partie exerce son droit de demander au gouverneur en conseil par requête qu'il exerce cette fonction ou ce pouvoir qui lui est délégué. Cette interprétation ressort clairement des termes employés par le législateur. Le gouverneur en conseil peut agir «à toute époque». Il peut modifier ou rescinder toute ordonnance, décision, règle ou règlement «à sa discrétion». Les règles auxquelles le législateur a astreint le CRTC ne sont pas répétées ni expressément ni implicitement à l'art. 64. Cette fonction s'applique aux ordonnances générales, quasi législatives du Conseil, de même qu'aux décisions *inter partes*. Bref, le gouverneur en conseil a entière discrétion dans la mesure où il respecte les limites fixées à sa compétence par le par. 64(1).

On a parfois reproché à la procédure prévue au par. 64(1) de constituer une intervention injustifiable dans le processus réglementaire: voir *Les organismes administratifs autonomes*, document de travail n° 25 de la Commission de réforme du droit du Canada (1980), aux pp. 96 à 98. La Commission a recommandé que:

soient abolies les dispositions qui prévoient que le Cabinet ou un ministre tranchera en dernier ressort les appels des décisions d'un organisme, sauf pour ce qui concerne les instances qui nécessitent l'équivalent de l'exercice du pouvoir de grâce ou une décision fondée sur des considérations humanitaires. (à la p. 97)

Certains peuvent considérer inhabituel et même inefficace que, dans une société organisée, le gouverneur en conseil puisse infirmer la décision soigneusement pesée d'un organisme administratif, rendue au terme d'une audition publique complète au cours de laquelle on a fait valoir plusieurs points de vue. D'autre part, le législateur est apparemment d'avis qu'il s'agit là d'un domaine particulièrement vulnérable aux changements des politiques d'intérêt public et il l'a par conséquent réservé à l'Exécutif qui doit en dernier ressort les appliquer. Vu l'interprétation du par. 64(1) que

s. 64(1) which I adopt, there is no need for the Governor in Council to give reasons for his decision, to hold any kind of a hearing, or even to acknowledge the receipt of a petition. It is not the function of this Court, however, to decide whether Cabinet appeals are desirable or not. I have only to decide whether the requirements of s. 64(1) have been satisfied.

In reaching this conclusion concerning the procedures to be followed with reference to s. 64(1), I am assisted by the reasoning of Megarry J. in *Bates v. Lord Hailsham*¹³ (cited by the majority judgment of this Court in *Nicholson, supra*). There the court was dealing with a challenge made to the legality of an order issued under the *Solicitors Act* abolishing a tariff of fees, on the grounds that the order should have been preceded by wider consideration by the rule enacting body. In refusing to intervene, Megarry J. stated at p. 1378:

Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy . . . I do not know of any implied right to be consulted or make objections, or any principle upon which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given.

Both the *Bates* case, *supra*, and this one deal with delegated legislation, the difference being that the delegatee in this case is, in effect, the executive branch of government while in the *Bates* case it was a committee of judges and solicitors constituted under s. 56 of the *Solicitors Act*. Under s. 56(2) the committee could

make general orders prescribing and regulating in such manner as they think fit the remuneration of solicitors in respect of noncontentious business.

¹³ [1972] 1 W.L.R. 1373.

j'adopte, le gouverneur en conseil n'a pas à motiver sa décision, à tenir quelque audience que ce soit ni même à accuser réception d'une requête. Il n'appartient pas à cette Cour, cependant, de décider si les appels interjetés au Cabinet sont souhaitables ou non. Je n'ai qu'à décider si les exigences du par. 64(1) ont été respectées.

Ma conclusion concernant les procédures à suivre aux termes du par. 64(1) est étayée par l'opinion du juge Megarry dans l'arrêt *Bates v. Lord Hailsham*¹³ (citée dans l'opinion de la majorité de cette Cour dans l'arrêt *Nicholson*, précité). La cour y examinait la régularité d'une ordonnance fondée sur la *Solicitors Act* abolissant un tarif d'honoraires; on opposait que l'organisme de réglementation aurait dû faire précéder l'ordonnance d'une consultation plus étendue. En refusant d'intervenir, le juge Megarry a dit à la p. 1378:

[TRADUCTION] Admettons que dans le domaine de ce qu'on appelle le quasi-judiciaire, on applique les règles de justice naturelle et, dans le domaine administratif ou exécutif, l'obligation générale d'agir équitablement. Mais cela ne me paraît pas s'appliquer au processus législatif, qu'il s'agisse de lois ou de législation déléguée. Plusieurs de ceux que la législation déléguée concerne, et souvent de façon très importante, ne sont jamais consultés au cours de son processus d'adoption; et pourtant ils n'ont aucun recours. . . . Il n'existe, que je sache, aucun droit implicite d'être consulté ou de présenter des objections, ni aucun principe en vertu duquel les tribunaux peuvent donner des ordres au pouvoir législatif à la demande de ceux qui prétendent qu'il n'a pas consacré un temps suffisant à la consultation et à l'étude de la question.

L'affaire *Bates* susmentionnée et la présente espèce portent sur la législation déléguée; la différence réside en ce que le délégataire en l'espèce est, en fait, l'Exécutif, alors que dans l'affaire *Bates*, il s'agissait d'un comité de juges et d'avocats constitué en vertu de l'art. 56 de la *Solicitors Act*. En vertu du par. 56(2), le comité pouvait:

[TRADUCTION] rendre des ordonnances générales établissant et réglementant de la manière qu'il estime appropriée la rémunération des procureurs dans les matières non contentieuses.

¹³ [1972] 1 W.L.R. 1373.

The Governor in Council under s. 64(1) is entitled to vary decisions on telephone tariffs already made by another body, but this difference does not strike me as material. Nor does the fact that a citizen may invoke the review procedure of s. 64(1) via petition, while no comparable right existed under the English act, constitute a valid ground of distinction. There is only one review procedure under s. 64(1) though it may be triggered in two ways, *i.e.*, by petition or by the Governor in Council's own motion. It is clear that the orders in question in *Bates* and the case at bar were legislative in nature and I adopt the reasoning of Megarry J. to the effect that no hearing is required in such cases. I realize, however, that the dividing line between legislative and administrative functions is not always easy to draw: see *Essex County Council v. Minister of Housing*¹⁴.

The answer is not to be found in continuing the search for words that will clearly and invariably differentiate between judicial and administrative on the one hand, or administrative and legislative on the other. It may be said that the use of the fairness principle as in *Nicholson, supra*, will obviate the need for the distinction in instances where the tribunal or agency is discharging a function with reference to something akin to a *lis* or where the agency may be described as an 'investigating body' as in the *Selvarajan* case, *supra*. Where, however, the executive branch has been assigned a function performable in the past by the Legislature itself and where the *res* or subject matter is not an individual concern or a right unique to the petitioner or appellant, different considerations may be thought to arise. The fact that the function has been assigned as here to a tier of agencies (the CRTC in the first instance and the Governor in Council in the second) does not, in my view, alter the political science pathology of the case. In such a circumstance the Court must fall back upon the basic jurisdictional supervisory role and in so doing construe the statute to determine whether the Governor in Council has performed its functions

Le paragraphe 64(1) autorise le gouverneur en conseil à modifier une décision sur les tarifs téléphoniques déjà rendue par un autre organisme, mais cette distinction ne me paraît pas pertinente. La possibilité qu'a un citoyen de recourir par requête à la procédure de révision prévue au par. 64(1), alors que la loi britannique ne créait pas de droit comparable, ne constitue pas non plus une différence valable. Le paragraphe 64(1) n'établit qu'une seule procédure de révision, qui peut cependant être déclenchée de deux façons, *c.-à-d.* par requête ou du propre mouvement du gouverneur en conseil. Les ordonnances en cause dans l'affaire *Bates* et en l'espèce sont manifestement de nature législative et j'adopte le raisonnement du juge Megarry qu'aucune audition n'est requise en pareils cas. Je suis conscient, cependant, que la ligne de démarcation entre les fonctions de nature législative et les fonctions de nature administratives n'est pas toujours facile à tracer: voir *Essex County Council v. Minister of Housing*¹⁴.

La solution ne réside pas dans la recherche constante de mots qui établiront clairement et dans tous les cas une distinction entre ce qui est judiciaire et administratif d'une part, et administratif et législatif de l'autre. On peut dire que l'utilisation du principe d'équité, comme dans l'arrêt *Nicholson*, précité, rendra la distinction inutile dans les cas où le tribunal ou l'organisme remplit une fonction relative à ce qui s'apparente à un litige ou lorsque l'organisme est «chargé d'enquête» comme dans l'arrêt *Selvarajan*, précité. Si, cependant, l'Exécutif s'est vu attribuer une fonction auparavant remplie par le législatif lui-même et que la *res* ou l'objet n'est pas de nature personnelle ou propre au requérant ou à l'appelant, l'on peut croire que des considérations différentes entrent en jeu. Le fait que la fonction ait été attribuée à deux paliers (au CRTC en premier lieu et au gouverneur en conseil en second lieu) ne change rien, à mon avis, au caractère anormal de l'affaire du point de vue des sciences politiques. En pareil cas, la Cour doit revenir à son rôle fondamental de surveillance de la compétence et, ce faisant, interpréter la Loi pour établir si le gouverneur en conseil a rempli ses fonctions dans les limites du

¹⁴ (1967), 66 L.G.R. 23.

¹⁴ (1967), 66 L.G.R. 23.

within the boundary of the parliamentary grant and in accordance with the terms of the parliamentary mandate.

The precise terminology employed by Parliament in s. 64 does not reveal to me any basis for the introduction by implication of the procedural trappings associated with administrative agencies in other areas to which the principle in *Nicholson*, *supra*, was directed. The roots of that authority do not reach the area of law with which we are concerned in scanning s. 64(1).

As mentioned at the outset, the Federal Court of Appeal, speaking through Le Dain J., agreed with the trial division except with respect to the lack of opportunity for the respondents to respond to the reply forwarded to the Governor in Council by Bell Canada in the proceedings initiated by the petition of the respondents. Le Dain J. regarded this issue as being one of fact depending for its determination on the nature of Bell Canada's answer and the issues raised thereby, and on the reasonableness of the delay of two weeks before the issuance of the decision of the Governor in Council. His Lordship concluded:

Since the question is essentially one of fact, one cannot say before the issue has been tried that the Statement of Claim does not disclose a reasonable cause of action.

For the reasons already given I am unable, with respect, to conclude that the issue of fairness arises in these proceedings on a proper construction of s. 64(1). If there were to be a distinction between rights arising with reference to submissions from government sources and rights arising with reference to the response from the rate applicant Bell Canada, more compelling reasons exist for disclosure of the intragovernmental communications as the respondents were, by this stage in these lengthy proceedings, very familiar with the application made by Bell Canada and the position taken by that company before the Commission by reason of the respondents' active participation in the hearings before the CRTC. In any case, I can discern nothing in s. 64(1) to justify a variable yardstick for the application to that section of the principle of fairness according to the source of the information placed before the Governor in Council for the

pouvoir et du mandat que lui a confiés le législateur.

Les termes précis qu'emploie le législateur à l'art. 64 ne justifient pas à mon sens l'introduction, par implication, des exigences de procédure propres aux organismes administratifs dans d'autres domaines que vise le principe énoncé dans l'arrêt *Nicholson*, précité. Les racines de cet arrêt n'atteignent pas le domaine juridique en cause dans l'étude du par. 64(1).

Comme je l'ai mentionné au début, le juge Le Dain, qui exprimait l'avis de la Cour d'appel fédérale, partage l'opinion de la Division de première instance sauf en ce qui concerne l'impossibilité dans laquelle les intimées ont été placées d'opposer une réplique à la réponse que Bell Canada a présentée au gouverneur en conseil dans les procédures déclenchées par leur requête. Le juge Le Dain a considéré qu'il s'agissait d'une question de fait dont la solution dépend de la nature de la réponse de Bell Canada et des points qu'elle a soulevés, ainsi que du caractère suffisant du délai de deux semaines avant l'annonce de la décision du gouverneur en conseil. Le juge a conclu:

Puisqu'il s'agit essentiellement d'une question de fait, on ne peut pas, avant l'audition du litige, affirmer que la déclaration ne révèle aucune cause raisonnable d'action.

Pour les motifs qui précèdent, je ne peux, avec égards, conclure, suivant une interprétation appropriée du par. 64(1), que ces procédures soulèvent la question d'équité. S'il faut distinguer les droits relatifs à des mémoires qui émanent de sources gouvernementales des droits relatifs à la réponse soumise par la requérante Bell Canada, la divulgation de rapports internes du gouvernement est plus justifiée parce qu'à ce stade de ces longues procédures, les intimées connaissaient bien la demande de Bell Canada et sa position devant le Conseil, vu leur participation active aux audiences du CRTC. Quoi qu'il en soit, rien au par. 64(1) ne me paraît justifier l'adoption d'un critère variable pour appliquer à ce paragraphe le principe d'équité selon la source des renseignements communiqués au gouverneur en conseil pour qu'il statue sur la requête des intimées. Le point fondamental est l'interprétation de cette disposition dans le contexte de la

disposition of the respondents' petition. The basic issue is the interpretation of this statutory provision in the context of the pattern of the statute in which it is found. In my view, once the proper construction of the section is determined, it applies consistently throughout the proceedings before the Governor in Council.

I would therefore allow the appeal and restore the order of the trial court. As to costs, the respondent has never asked for costs and the Attorney General of Canada at the hearing in this Court placed himself in the hands of the Court. In all the circumstances of these proceedings, I would not consider this to be a case for costs and I would award no costs to any party in this Court or in any of the courts below.

Appeal allowed.

Solicitor for the defendant, appellant: R. Tassé, Ottawa.

Solicitor for the plaintiffs, respondents: Andrew J. Roman, Toronto.

Loi où elle se trouve. A mon avis, une fois établie, la bonne interprétation à y donner s'applique à l'ensemble des procédures devant le gouverneur en conseil.

Je suis d'avis, par conséquent, d'accueillir le pourvoi et de rétablir l'ordonnance de la cour de première instance. En ce qui concerne les dépens, les intimées n'en ont jamais demandé et, à l'audience, le procureur général du Canada s'en est remis à cette Cour. Etant donné toutes les circonstances de cette affaire, j'estime qu'il ne s'agit pas d'un cas où des dépens devraient être adjugés et je suis d'avis de n'adjuger aux parties aucuns dépens en cette Cour ou dans les cours d'instance inférieure.

Pourvoi accueilli.

Procureur du défendeur, appelant: R. Tassé, Ottawa.

Procureur des demanderesses, intimées: Andrew J. Roman, Toronto.



A. Lassonde Inc. v. Sunpac Foods Ltd., 1998 CanLII 7983 (FC)

TAB 7

Date: 1998-06-19
Docket: T-393-98
Parallel citations: 81 CPR (3d) 515; 149 FTR 237
URL: <http://canlii.ca/t/4bkq>
Citation: A. Lassonde Inc. v. Sunpac Foods Ltd., 1998 CanLII 7983 (FC), <<http://canlii.ca/t/4bkq>> retrieved on 2014-04-19
Noteup: Search for decisions citing this decision
Reflex Record Related decisions, legislation cited and decisions cited

Date: 19980619 Docket: T-393-98

BETWEEN:

A. LASSONDE INC.

Plaintiff

AND SUNPAC FOODS LIMITED

Defendant

REASONS FOR ORDER

RICHARD MORNEAU, PROTHONOTARY:

Introduction

[1] Through this motion, the plaintiff defendant to the counterclaim (the plaintiff) seeks, pursuant to Rule 221 of the *Federal Court Rules, 1998* (the Rules), to have a series of paragraphs - 13 in total - struck from the statement of defence and counterclaim (the statement of defence) filed by Sun Pac Foods Limited (the defendant).

[2] In the alternative, should this relief not be granted, the plaintiff requests further and better particulars for most of these paragraphs pursuant to Rule 181.

Page: 2 [3] Finally, in any event, the plaintiff seeks an additional extension pursuant to Rule 8 to serve and file its reply and defence to counterclaim. The Court was also asked to make any other order it deems appropriate in the circumstances.

[4] The plaintiff comes before this Court believing that its exclusive rights in the trade-mark

FRUITÉ have a specific scope. The defendant casts doubt on this scope in its statement of defence, and especially in the paragraphs challenged by the plaintiff.

[5] The scope of these rights must eventually be determined, but I am not convinced that this can be done by way of a motion to strike. It is a point of law which does not lend itself well to a motion like the plaintiff's motion.

[6] As this Court stated in *Apotex Inc. et al. v. Wellcome Foundation Ltd. et al.* (1996), 68

C.P.R. (3d) 23, at page 41 (F.C.T.D.):

In conclusion, I would like to reiterate that striking out pleadings is a draconian measure. The defendants may not have a strong case on some of the issues raised by the plaintiffs in their motion. However, the test in my view is stringent: if there is a scintilla of success in a claim, a Court should not strike it down. As pointed out by counsel for the defendant Apotex, this is not a mini-trial or a summary judgment proceeding where I could have resolved some of the issues. The case law is clear that it has to be beyond doubt. Despite able argument by counsels for the plaintiff Wellcome, I have not been convinced that there is sufficient lack of substance to use this draconian measure, thereby depriving the defendants of their day in Court.

[Emphasis added]

Page: 3

Facts

[7] It is clear from the evidence that the two parties are direct competitors in the fruit juice and fruit drink business.

[8] The plaintiff obtained a certificate of registration under the [Trade-marks Act, R.S.C., 1985, c. T-13](#) (the [Act](#)), for the trade-mark FRUITS.

[9] The defendant holds a certificate under the [Act](#) for the trade-mark FRUIT RHAPSODY.

[10] The conflict between the parties arises from the fact that the defendant uses the expression RHAPSODIE FRUITÉE (emphasis added) as the French equivalent for its trade-mark FRUIT RHAPSODY.

[11] In the plaintiffs opinion, the use of this word as a trade-mark is an infringement, within the meaning of [section 20](#) of the [Act](#), of its exclusive right to the use of FRUITÉ in association with fruit juices and fruit drinks. It alleges that this use depreciates the value of the goodwill attaching to the trade-mark ([section 22](#) of the [Act](#)) and constitutes unfair competition ([paragraphs 7\(b\) and 7\(c\)](#) of the [Act](#)).

Page: 4

Tests for striking out pleadings and for particulars

[12] The possibility of seeking to have a pleading, or anything contained therein, struck out in

the course of an action is now provided for in Rule 221. As this rule is the equivalent of Rule 419 of the *Federal Court Rules*, the case law developed in respect of Rule 419 applies to Rule 221.

[13] Thus, under paragraph 221(1)(a), it must be plain and obvious (see *Canada (A.G.) v. Inuit Tapirisat*, [1980 CanLII 21 \(SCC\)](#), [1980] 2 S.C.R. 735, at page 740) that all or part of the defendant's statement of defence discloses no reasonable cause of defence.

[14] To apply the other paragraphs of Rule 221 in the instant case, the impugned pleadings must be so intolerable and prejudicial that they must be struck in whole or in part. As Mr. Justice Teitelbaum of this Court stated in *Copperhead Brewing Co. Ltd. v. John Labatt Ltd. et al.* (1995), 61 C.P.R. (3d) 317, at page 322:

the jurisprudence is consistent that under Rules 419(1)(b) through (d) it must be established that the pleading is so clearly immaterial, frivolous, embarrassing or abusive that it is obviously forlorn and futile (*Bitronbyllachine & Mill Equipment Ltd. v. Berglund Industrial Supply Co. Ltd.* (1982), 64 C.P.R. (2d) 206 (F.C.T.D.)) and that the court will not strike mere surplus statements where no prejudice flows from them (*Paler International Airtortnotive Frarac[rising Inc. v. Mister Mechanic Inc.* [reflex](#), (1989) 28 C.P.R. (3d) 308, 27 C.I.P.R. 112, [1990] 1 F.C. 237 (T.D.)). As I am not entirely satisfied that the defendants will suffer prejudice if para. 9 is not struck, I will allow para. 9 and Sch. "A" to remain in the amended statement of claim.

[15] As for the tests concerning further particulars, the Court must consider whether one party has enough information to be able to understand the adverse party's position and to prepare an

Page: 5

adequate response, whether a defence or a reply. (See *Astra Aktiebolag v. Inflazyme Pharmaceuticals Inc.* [reflex](#), (1995), 61 C.P.R. (3d) 178 (F.C.T.D.), at page 184.)

[16] In *Embee Electronic Agencies Ltd. v. Agence Sherwood Agencies Inc. et al.* (1979), 43 C.P.R. (2d) 285 (F.C.T.D.), at page 287, Marceau J. explained the extent to which the defendant is entitled to particulars of the plaintiff's evidence at the pleadings stage:

At that early stage, a defendant is entitled to be furnished all particulars which will enable him to better understand the position of the plaintiff, see the basis of the case made against him and appreciate the facts on which it is founded so that he may reply intelligently to the statement of claim and state properly the grounds of defence on which he himself relies, but he is not entitled to go any further and require more than that.

[No emphasis in original.]

Analysis

[17] It seems to me on reading the parties' pleadings and the other documents submitted in relation to this motion that the plaintiff now has enough information to be able to understand the defendant's position and to prepare an intelligent and adequate reply to the defendant's statement of defence.

[18] Obviously the plaintiff does not accept the defendant's narrow reading of its exclusive rights in the trade-mark FRUITÉ. In my view, however, this is not a reason to force the defendant to furnish particulars for and further justify a position that counsel for the plaintiff

Page: 6 seems to understand very well. Counsel for the plaintiff discusses and analyses this position in

great detail in the written submissions in support of his motion.

[19] There is accordingly no reason to make a general order that further particulars be furnished to the plaintiff.

[20] As for the requests to strike, it must be understood that all the impugned paragraphs of the statement of defence are based on the same premise.

[21] This premise is the defendant's submission that the plaintiffs certificate of registration is limited to the trade-mark FRUITÉ ET DESSIN and that the plaintiff cannot claim rights in the simple word "fruits" itself based on the history of the mark.

[22] Consequently, it submits that its use of RHAPSODIE FRUITÉE does not infringe the trade-mark FRUITÉ ET DESSIN and that RHAPSODIE FRUITÉE is an authorized use pursuant to subparagraph 20(1)(b)(ü) of the [Act](#):

20. The right of the owner of a registered trade-mark to its exclusive use shall be deemed to be infringed by a person not entitled to its use under this [Act](#) who sells, distributes or advertises wares or services in association with a confusing trade-mark or trade-name, but no registration of a trade-mark prevents a person from making

(a) --

(b) any *bona fide* use, other than as a trade-mark, (i) --

(ii) of any accurate description of the character or quality of his wares or services,

in such a manner as is not likely to have the effect of depreciating the value of the goodwill attaching to the trade-mark.

Page: 7 [23] Counsel for the plaintiff argues forcefully that as no disclaimer with respect to the word "fruité" was required by the Registrar pursuant to [section 35](#) of the [Act](#), it follows that the plaintiff was granted the right to the exclusive use not only of the design of the trade-mark FRUITÉ but also of the word FRUITÉ itself.

[24] As mentioned supra, the scope of the plaintiff's exclusive use is the central issue of the case on the merits. I am accordingly of the view that the paragraphs of the statement of defence which challenge this scope in one way or another should not be struck. Therefore, paragraphs 4, 7, 10, 12, 19, 20(i)(a), 20(11) and 21(11) of the statement of defence may remain.

[25] The same result must apply to paragraph 9 of the statement of defence, as counsel for the plaintiff did not refer to it in written or oral argument.

[26] As for the impact of the licenses issued by the plaintiff, counsel for the plaintiff is very familiar with his client's factual situation in this regard. He can easily respond to the defendant regarding any allegations concerning the reduction of the distinctiveness of his client's trade-mark.

It is theoretically possible that the defendant's allegations will be proven correct. Accordingly, allegations 21(1) and (iii) of the statement of defence may remain.

[27] As for [paragraph 20\(i\)\(b\)](#), I consider that the dates mentioned in this paragraph, when it is read as a whole, are not wrong. This paragraph will not be struck out.

Page: 8 [28] Counsel for the plaintiff further submits that from an objective point of view, the defendant should have translated his trade-mark FRUIT RHAPSODY as RHAPSODIE DE FRUITS rather than RHAPSODIE FRUITÉE. In my opinion, that is a question of evidence, indeed of expert evidence. It cannot therefore be ordered at this time that paragraph 8 of the defence be struck out on this basis.

[29] Paragraph 8 -to which must be added paragraphs 11, 16 and 17- also appears to refer to the expression "*bona fide*" use as it is used in the [Act](#). Once again, these paragraphs will not be struck out. Similarly, the determination of whether RHAPSODIE FRUITÉE is used as an accurate description of the character or quality of the beverages or as an adjective is also a question of evidence which should be left to the full hearing.

[30] However, the defendant refers in paragraph 7 -and possibly in paragraph 5- of its statement of defence to the use of RHAPSODIE FRUITÉE as a trade-mark. This statement is clearly contrary to [paragraph 20\(1\)\(b\)](#) of the [Act](#).

[31] The defendant will accordingly be required to amend its statement of defence and counterclaim to eliminate any reference to the use of RHAPSODIE FRUITÉE as a trade-mark within thirty (30) days of the date of the order accompanying these reasons. I consider this order appropriate in the circumstances [see para. ³, supra].

Page: 9 [32] The plaintiff will then have thirty (30) days from the date of service of the defendant's statement of defence and counterclaim to serve and file its reply and defence to counterclaim.

[33] Costs of this motion will be in the cause.

Richard Morneau

Prothonotary

MONTRÉAL, QUEBEC June 19, 1998

Certified true translation n

M. Iveson

FEDERAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.: T-393-98

STYLE OF CAUSE: A. LASSONDE INC.

Plaintiff

AND:

SUNPAC FOODS LIMITED

Defendant

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: June 8, 1998

REASONS FOR ORDER OF THE COURT BY RICHARD MORNEAU, PROTHONOTARY

Dated: June 19, 1998

APPEARANCES:

Bruno Barrette for the plaintiff

Keri Johnston for the defendant

2- T-393-98

SOLICITORS OF RECORD:

Brouillette Charpentier Fortin for the plaintiff Montréal, Quebec

Malcom Johnston & Associates for the defendant Toronto, Ontario

COURT OF APPEAL FOR ONTARIO

CITATION: St. Lewis v. Rancourt, 2013 ONCA 701

DATE: 20131115

DOCKET: C56905

Hoy A.C.J.O., Sharpe and Blair JJ.A.

BETWEEN

Joanne St. Lewis

Plaintiff (Respondent)

and

Denis Rancourt

Defendant (Appellant)

Denis Rancourt, appearing in person

Richard Dearden, for the plaintiff (respondent) Joanne St. Lewis

Peter Doody, for the University of Ottawa

Heard: November 8, 2013

On appeal from the order of Justice Robert J. Smith of the Superior Court of Justice, dated March 13, 2013.

APPEAL BOOK ENDORSEMENT

[1] The appellant appeals the March 13, 2013 order of Smith J., dismissing the appellant's motion to stay or dismiss the respondent, Joanne St. Lewis'

defamation order against him on the basis that it was the product of maintenance and champerty. We are not persuaded that any of the several grounds he advances has merit. We see no error of law on the part of the motion judge in concluding on the ample evidence before him that the respondent's employer's decision to fund the litigation did not amount to maintenance or champerty. Nor did the respondent's unilateral decision to donate a portion of any punitive damages she might receive to a scholarship at the employer university make out maintenance or champerty. Moreover, the underlying findings of fact made by the motion judge were reasonably supported by the record.

[2] As to the appellant's bias or appearance of bias submission, it in our view has no merit. It was fully considered by Annis J. and rejected. We agree with that decision and, in any event, that decision is not open to challenge in this court.

[3] The appellant also argued in his factum that the motion judge had not given him adequate time to make his submissions. We reject this argument. The time allocated was clearly announced and reasonable.

[4] This appeal is accordingly dismissed. The appellant shall pay the respondent, Ms. St. Lewis, costs in the amount of \$20,000, all inclusive, and pay the respondent university costs in the amount of \$15,000, all inclusive.

CITATION: St. Lewis v. Rancourt, 2013 ONSC 1564

COURT FILE NO.: 11-51657

DATE: 2013/03/13

ONTARIO

SUPERIOR COURT OF JUSTICE

TAB 9

BETWEEN:

Joanne St. Lewis

Plaintiff

)
)
) Richard G. Dearden / Anastasia Semenova,
) for the Plaintiff
)

– and –

Denis Rancourt

Defendant

)
) Denis Rancourt, self-represented
)
)

University of Ottawa

) Peter K. Doody, for the University of Ottawa
)
)

Rule 37 Affected Party

)
)
) **HEARD:** December 13, 2012
)

REASONS FOR DECISION ON THE CHAMPERTY MOTION

R. SMITH J.

Overview

[1] Denis Rancourt (“Rancourt”) seeks an order dismissing or staying Joanne St. Lewis’ (“St. Lewis”) defamation action against him as an abuse of process, because he alleges that the University of Ottawa’s agreement to pay her legal costs constitutes champerty and maintenance.

[2] The defendant Rancourt is a former Physics Professor at the University of Ottawa (the “University”). He published a blog on February 11, 2011 in which he referred to St. Lewis as “Allan Rock’s house negro”.

[3] St. Lewis is an Assistant Law Professor employed by the University who teaches in the area of equality rights, and has a reputation in anti-racism. She became a tenured professor in 2001. She is also a Black woman.

[4] In the fall of 2008, St. Lewis was asked by President Rock to prepare an evaluation of the University Student Appeal Centre's report that had alleged systemic racism at the University. In her report, St. Lewis concluded that there was no systemic racism at the University and that the University's academic fraud process was well founded.

[5] In April 2011, shortly after St. Lewis became aware of Rancourt's blog referring to her as "Allan Rock's house negro", she met with Dean Feldthusen to advise him that she had to sue Rancourt for libel. St. Lewis and Dean Feldthusen then met with University President Allan Rock to request that the University pay for her legal costs for her libel action against Rancourt. President Rock agreed to pay St. Lewis' legal costs because the allegedly defamatory comments in Rancourt's blog were related to the report which St. Lewis had prepared as an employee of the University and at the request of the University.

[6] On June 23, 2011, St. Lewis issued a statement of claim against Rancourt claiming \$1 million in damages for defamation.

Issues

[7] The following issues must be decided:

- (1) Should Rancourt's affidavits, affirmed on April 23 and May 23, 2012, be admitted into evidence on the champerty motion?
- (2) Should a trial of an issue be ordered?
- (3) Does the University's agreement to pay for St. Lewis' legal costs of her defamation action against Rancourt constitute champerty and maintenance?

Background Facts

[8] Rancourt is a former Physics Professor at the University of Ottawa. He publishes a blog entitled "U of O Watch". On February 11, 2011, Rancourt published an article entitled "Did Professor St. Lewis Act as Allan Rock's House Negro?"

[9] St. Lewis is an Assistant Professor in the Common Law Section of the Faculty of Law at the University of Ottawa. She was awarded full tenure in 2001. St. Lewis co-chaired the Canadian Bar Association working group on racial equality and authored the report titled 'Virtual Justice, Systemic Racism in the Canadian Legal Profession'. St. Lewis has also taught a number of courses that examined issues of racism in a variety of contexts and has an established reputation as an expert in anti-racism and critical race theory as an academic public speaker and facilitator.

[10] In November 2008, the Student Appeal Centre ("SAC") published its 2008 Annual Report entitled "Mistreatment of Students, Unfair Practices and Systemic Racism at the University of Ottawa". Shortly thereafter, University President Allan Rock asked St. Lewis, in her capacity as a Professor of Law and as the Director of the Human Rights Research and Education Centre, to provide an assessment of whether the allegations of systemic racism in the

University's Academic Fraud Process were well founded. St. Lewis accepted the President's request and conducted an evaluation of the SAC's 2008 Annual Report.

[11] St. Lewis completed her final report entitled "Evaluation Report of the Student Appeal Centre 2008 Annual Report" which was released on November 15, 2008. In her report, St. Lewis concluded that there was no systemic racism at the University. Rancourt was not mentioned in her report.

[12] St. Lewis alleges that a number of the statements contained Rancourt's February 11, 2011 blog are false, defamatory and racist.

[13] On May 18, 2011, Rancourt published a further statement in response to a Notice of Libel he received which St. Lewis also alleges contains false, defamatory, and racist statements about her.

[14] On or about mid-April of 2011, the plaintiff became aware that Rancourt had referred to her as a 'House Negro' of the University of Ottawa President Allan Rock. St. Lewis met with Dean Bruce Feldthusen to advise him that she had to sue Rancourt for damages to her personal and professional reputation. At the meeting, Dean Feldthusen and St. Lewis decided to meet with the University of Ottawa President Allan Rock to advise him about her defamation action and to request that the University pay for the legal costs of her libel action. The meeting was held on April 15, 2011 between President Rock, St. Lewis and Dean Feldthusen at which time President Rock, on behalf of the University, agreed to fund the legal costs of St. Lewis' libel action against Rancourt.

[15] The University gave the following two reasons for funding St. Lewis' libel action:

- (a) Rancourt's defamatory remarks about St. Lewis were occasioned by work, which she had undertaken at the request of the University and in the course of her duties and responsibilities as an employee of the University; and
- (b) Rancourt's racist attack upon St. Lewis took the case out of the ordinary and created a moral obligation for the University to provide support for a professor in defence of her reputation.

[16] The University of Ottawa is an educational institution governed by statute and mandated to perform the public role of education and research. The University acknowledges that it receives some Government funding.

[17] In her statement of claim, St. Lewis unilaterally proposed to give half of the punitive damages awarded to the Danny Grover Routes to Freedom Graduate Law Student Scholarship Fund. The fund is administered by the University.

Issue #1 Should Rancourt's affidavits, affirmed on April 23 and May 23, 2012, be admitted into evidence on the champerty motion?

Facts related to the admissibility of the April 23, 2012 and May 23, 2012 affidavits

[18] On January 25, 2012, Rancourt served this notice of motion seeking an order that the action be stayed or dismissed on the ground that the action is vexatious or otherwise an abuse of process, contrary to Rule 21.01(3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 on the grounds that the University's agreement to fund St. Lewis' libel action constitutes champerty and maintenance.

[19] Rancourt's motion relies on evidence contained in his affidavit affirmed on January 16, 2012 which consisted of a nine page affidavit plus 191 pages of attached exhibits. The plaintiff did not cross-examine Rancourt on his affidavit.

[20] Beaudoin J. was initially appointed as the Case Management Judge for this action. The University sought leave to intervene in the defendant's motion to have the action stayed or dismissed on the basis of champerty and maintenance. Beaudoin J. held that leave was not required because the University would be affected by the order and pursuant to r. 37.07(1), and as a result, held that the University had the right to file material in response to Rancourt's motion.

[21] The University filed affidavits from Allan Rock, the president of the University of Ottawa, and Céline Delorme, counsel for the University, in the labour arbitration arising out of the dismissal of Rancourt by the University in 2009. These affidavits were sworn on February 21 and 16, 2012 respectively. The University also served and filed affidavits from Bruce Feldthusen, Dean of the Faculty of Common Law at the University and the plaintiff, St. Lewis, which were sworn on February 21, 2012.

[22] On April 2, 2012, a case conference was held before Beaudoin J. who issued an endorsement containing the following terms:

- (1) Mr. Rancourt will examine Mr. Giroux, Chair of the Board of Governors of the University of Ottawa (as a witness on the pending motion on April 18, 2012 at 10:00 a.m.).
- (2) Mr. Rancourt will cross-examine Mr. Rock on his affidavit on April 18, 2012 at 2:00 p.m.
- (3) Mr. Rancourt will cross-examine Ms. St. Lewis on her affidavit on April 23, 2012 at 10:00 a.m.
- (4) Mr. Rancourt will cross-examine Mr. Feldthusen on his affidavit on April 23, 2012 at 2:00 p.m.
- (5) Mr. Rancourt will cross-examine Ms. Delorme on her affidavit on April 24, 2012 at 10:00 a.m.

- (6) Mr. Rancourt will deliver any supplementary affidavit to the evidence given by Mr. Giroux at his examination by April 23, 2012. [emphasis added]

[23] The cross-examinations by Rancourt took place on the dates and times set out in the above case conference endorsement.

[24] On April 23, 2012, Rancourt delivered a further affidavit affirmed by him. This affidavit attached three documents he received from St. Lewis in April 2012, and six documents which were copies of exhibits referred to in the cross-examination on the affidavits, all of which were attached as Exhibits A, B, C, E, F, G, H, I, and J, to his affidavit. A third section of this affidavit referred to unidentified documents that Rancourt believed would be produced by the University in his labour arbitration in May 2012.

[25] On May 4, 2012, a further case management conference was held before Beaudoin J. During that case conference, the University advised Rancourt and the court that its position was that Rancourt's April 23rd affidavit was not admissible. On May 4, 2012, Beaudoin J. made the following endorsement related to this issue:

3. The Champerty Motion will be heard at 10:00 a.m. on August 29, 2012. The Defendant's request to file additional affidavit material for use on the motion will be dealt with at that time.

[26] The documents attached as Exhibits A-J to Rancourt's April 23, 2012 affidavit are all documents which he had in his possession prior to the cross-examination of Mr. Giroux. All but one of the exhibits relate to Mr. Rock and not to Mr. Giroux or his evidence. The exhibit relating to Mr. Giroux (Exhibit D) is a copy of an article written by a professor at the University of Waterloo about whether Rancourt's dismissal by the University in 2009 was justified. This evidence is not relevant to the champerty motion.

[27] On June 20, 2012, Beaudoin J. heard a motion by Rancourt to compel the witnesses tendered by the University, including Mr. Giroux, to answer questions and produce documents which they had refused during their cross-examinations. Rancourt's refusals motion was entirely dismissed by Beaudoin J. His written reasons were released on August 2, 2012. At paras. 30-31 of his decision, Beaudoin J. stated as follows:

In the Compendium of Argument that he filed at the hearing of this motion, Dr. Rancourt alleges for the first time on page 1:

In order to establish that the University has engaged in maintenance and champerty to the extent that it constitutes an abuse of process, the Defendant wishes to demonstrate that the **real motive for the University funding the litigation of the Plaintiff is to persecute, harm, and/or suppress the Defendant and, as such, that the action is vexatious and an abuse of process.** (Emphasis mine)

[28] Rancourt's allegation about the University's alleged improper motive was not mentioned anywhere in his Notice of Motion or in his Affidavit material filed in support of his champerty motion in January 2012.

[29] The issues addressed in Rancourt's April 23rd affidavit relate to copies of e-mails between St. Lewis and Allan Rock, as well as Stéphane Énard-Chabot, the article by Professor Westhues and e-mails to or from Allan Rock related to Rancourt's conduct as a professor or related to his dismissal. Rancourt's May 23rd affidavit relates to alleged covert surveillance of him by the University, the alleged use of Rancourt's medical information by the University without his knowledge or consent, and also an e-mail sent in 2008 related to Rancourt's dismissal.

[30] In para. 33 of Beaudoin J.'s August 2, 2012 decision, he stated:

Relevancy is determined by an examination of the issues raised on the motion, and by a review of the affidavits filed in support and in response. However, a party cannot broaden the scope of cross-examinations beyond what is required to determine the issues in the motion by putting irrelevant material in his or her transcript.¹ I would add that a party cannot broaden the scope of cross-examination by including a reference to irrelevant material in his or her Notice of Examination.

[31] Beaudoin J. decided that the issues dealt with by Rancourt in his April 23rd and May 23, 2012 affidavits were not relevant to the champerty motion. On Issue 15 in the refusals motion with regard to Mr. Giroux, Mr. Giroux refused to answer the question "Does the University have any policy or directives about its use of surveillance of professors or students?" Beaudoin J. stated as follows:

Ruling: Not relevant to the matters raised in the Notice of Motion. Dr. Rancourt was aware of surveillance of himself in 2008 before Mr. Rock became President, moreover, this is being litigated in the labour arbitration.

[32] Exhibit I attached to Rancourt's April 23rd affidavit was put to President Rock during his cross-examination as "evidence which Mr. Rock may or may not be aware of and extensive covert surveillance campaign of me and of my students that was run by the University of Ottawa". In his factum on this motion, Rancourt relies on Exhibits C, D, E, F, H and I to the April 23rd affidavit as evidence to establish that "the University ran an extensive covert information gathering campaign against full tenured Professor Rancourt, with a hired student who used a false identity and fraudulent methods."

¹ *BASF Canada Inc. v. Max Auto Supply (1986) Inc.*, [1998] O.J. No. 3676 at para. 10 (S.C.J.) (Master Beaudoin); *Caputo v. Imperial Tobacco Ltd.*, [2002] O.J. No. 3767 at para. 14 (S.C.J.) (Master Macleod).

[33] Rancourt abandoned the issue of asking Mr. Rock if he was aware that the University made a third party psychiatric assessment of him without his knowledge or consent. He also abandoned the issue of whether Mr. Rock had ever paid to obtain recordings or transcripts of any of Rancourt's various talks or interviews.

[34] Exhibit J to Rancourt's April 23, 2012 affidavit is a copy of a letter from the University to Dr. Louis Morissette. Rancourt relies on this letter as evidence that the University obtained a psychiatric evaluation of him without his knowledge or consent. However, Beaudoin J. has already ruled this issue was irrelevant to the champerty motion.

[35] Rancourt brought a motion seeking Leave to Appeal from Beaudoin J.'s determination of the relevance of these issues. Leave to Appeal was denied by Annis J. in his decision dated November 29, 2012 as a result Beaudoin J.'s decision is final and binding.

[36] Rancourt worked at the University for 23 years as a Physics Professor until he was dismissed by the University in 2009. His dismissal is presently being contested in a labour arbitration between his union and the University. He attained the rank of a fully tenured Professor in 1997.

[37] In his affidavit of January 2012 filed in support of his motion, Rancourt set out the following reasons for finding an abuse of process based on champerty and maintenance:

- (a) the University was using a fact of the defamation litigation and its content as evidence against him in the labour arbitration;
- (b) the University was entirely funding the plaintiff's defamation action (the University agrees that it is fully funding St. Lewis' legal costs in the defamation action); and
- (c) the University was receiving a share of the proceeds of the action because the plaintiff had stated in her Statement of Claim that if punitive damages were awarded against Rancourt, she would donate half of the award of punitive damages to the Danny Grover Routes to Freedom Graduate Law Student Scholarship Fund.

[38] The two allegations made in his January affidavit in respect of the motive of the University for funding St. Lewis' defamation action are as follows:

- (a) Firstly, that the University was using the fact of the defamation litigation and its contents as evidence against him in the labour arbitration; and
- (b) Secondly, that the University was receiving a share of the proceeds of the action.

[39] In a letter from the University's lawyer, David W. Scott, dated October 25, 2011, Rancourt was advised that the University was entirely funding the plaintiff's defamation action for the reasons set out in the letter. Mr. Scott wrote as follows:

Indeed, the University of Ottawa is reimbursing Professor St. Lewis for her legal fees incurred in her defamation proceeding in the Courts against you. Your defamatory remarks about Professor St. Lewis were occasioned by work which she undertook at the request of the University and in the course of her duties and responsibilities as an employee. Her efforts were not personal, but in the interests of the University. Furthermore, your outrageously racist attack upon her takes this case out of the ordinary and, in the view of the University, alone creates a moral obligation to provide support for her in defence of her reputation.

[40] In his affidavit, Mr. Rock stated that he made the decision that the University would reimburse St. Lewis for her legal fees incurred in her defamation action against Rancourt. Mr. Rock further stated that it was St. Lewis' action, and that only she provided instructions to her counsel. He further stated that the University has not, and does not provide instructions to St. Lewis' legal counsel.

[41] The senior management committee (known as the Administrative Committee) of the University and the Executive Committee of the University's Board of Directors were made aware of Mr. Allan Rock's decision on behalf of the University that it would reimburse St. Lewis for her legal fees in this proceeding.

[42] Mr. Rock has also stated that he never had any discussion with St. Lewis about her proposal to donate half of any punitive damages awarded to the Danny Grover Routes to Freedom Graduate Law Student Scholarship Fund. Mr. Rock stated "I never discussed this aspect of the matter with her. My decision to have the University reimburse her for her legal fees had nothing to do with her intention to donate a portion of any eventual award to a scholarship fund." Mr. Rock further stated at para. 10 of his affidavit:

At the time that I agreed that the University would reimburse Professor St. Lewis for her legal fees, I had no idea that she intended to donate any portion of any damages she may be awarded to the scholarship fund. I first became aware of that fact after the Statement of Claim had been issued.

[43] Ms. Delorme stated in her affidavit that the University was not using St. Lewis' defamation action in the labour arbitration, nor was it asking the arbitrator to determine issues related to the defamation action. The University was only asking the labour arbitrator to consider the content of the defendant's blog – namely, the statements he made about St. Lewis, but not to consider the fact that he was involved in a defamation lawsuit.

[44] Robert Giroux, who was the Chair of the Board of Governors of the University, stated that he knew nothing of any proceeds of the action going to the University and he was told that the decision had been made because a Professor had been "tainted" and that Mr. Rock felt it appropriate to support her.

Analysis

Issue previously decided by Beaudoin J.

[45] In his decision, *St. Lewis v. Rancourt*, 2012 ONSC 4494, dated August 2, 2012, Beaudoin J. has already ruled that the evidence sought to be introduced in Rancourt's April 23 and May 23 affidavits was irrelevant to the issues involved in the champerty motion. As a result, I agree with the University's submission that based on Beaudoin J.'s findings, the defendant is estopped from relitigating the same issues raised in the above affidavits, in this champerty motion.

[46] In his decision of August 2, 2012, Beaudoin J. held that the only relevant allegations of fact related to champerty and maintenance motion were those made by Rancourt in his Notice of Motion and supporting affidavit dated in January 2012. Those allegations were as follows:

- (1) The University is entirely funding the litigation;
- (2) The University will receive a share of the proceeds; and
- (3) The University is using the fact of the defamation suit to bar the defendant a return to his post even if his dismissal is found to be unjustified.

[47] Beaudoin J. ruled that the evidence which sought to establish "that the real motive for the University funding the litigation of the Plaintiff is to persecute, harm and/or suppress the Defendant and, as such, the action is vexatious and an abuse of process", was irrelevant and inadmissible on the champerty motion.

[48] If an issue has been decided by the Court between the same parties, then neither party can be allowed to argue the same issue over again. The interlocutory judgment of Beaudoin J. at para. 30 on that issue is binding, when the same question is raised between the same parties in the same action. (See *Diamond v. Western Realty Co.*, [1924] S.C.R. 308, at p. 8; *Hawley v. North Shore Mercantile Corp.*, 2009 ONCA 679, 255 O.A.C. 143, at paras. 25-26 and *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* (1997), 35, O.R. (3d) 273 at pages 3-6.)

[49] In the case conference decision of April 2, 2012, Beaudoin J. decided that Rancourt was permitted to deliver a supplementary affidavit by April 23, 2012 to respond to the evidence given by Mr. Giroux at his cross-examination. The affidavits of April 23rd and May 23rd do not respond to Mr. Giroux's evidence other than attaching an irrelevant article about the merits of Rancourt's dismissal written by a professor from the University of Waterloo. Rancourt's supplemental affidavits attempt to introduce evidence of e-mails indicating that Allan Rock was upset with some of Rancourt's actions and statements made before the University decided to terminate Rancourt's employment as a professor.

[50] I agree with the University's submission that the evidence sought to be filed in Rancourt's April 23 and May 23, 2012 affidavits is irrelevant and inadmissible. Beaudoin J. has previously decided that relevancy was determined by an examination of the issues raised in his

motion and by a review of the affidavits filed in support of the champerty motion by Rancourt in January 2012 and the affidavits filed in response. Leave to Appeal was denied and this decision remains final and binding on the parties.

Further affidavits not permitted after cross-examination under Rule 39.02(2)

[51] The University also submits that Rancourt's affidavits of April 23 and May 23, 2012 should not be admitted because they do not comply with Rule 39.02(2) which reads as follows:

A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03. R.R.O. 1990, Reg. 194, r. 39.02 (2).

[52] The Notice of Motion and supporting affidavit of January 16, 2012 filed by Rancourt made no mention of the alleged motive set out in para. 30 of Beaudoin J.'s reasons of August 2, 2012. Rancourt's affidavits of April 23rd and May 23rd only peripherally address an alleged improper motive which was not mentioned in Rancourt's initial motion materials, and consequently this issue was not specifically addressed in any of St. Lewis' or the University's responding materials. The responding parties argue that the affidavits should be inadmissible for this reason as well.

[53] Rule 39.02(2) requires that leave be obtained in order to file further affidavits after a party has completed his or her cross-examinations. In *Sure Track Courier Ltd. v. Kaisersingh*, 2011 ONSC 7388 (Ont. Sup.Ct.), at para. 29, the Court stated that leave to file affidavits after cross-examination should be granted sparingly.

[54] The criteria for granting leave to file additional affidavit material, after cross-examination on the affidavits have been completed, were set out in *First Capital Realty Inc. v. Centrecorp Management Services Ltd.*, (2009) 258 O.A.C. 76 (Ont. Sup Ct. (Div. Ct.)), at para. 13, where the Divisional Court stated as follows:

- 1) Is the evidence relevant?
- 2) Does the evidence respond to a matter raised on the cross-examination, not necessarily raised for the first time?
- 3) Would granting leave to file the evidence result in non-compensable prejudice that could not be addressed by imposing costs, terms, or an adjournment?
- 4) Did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?

[55] I find that leave to adduce the further affidavits of April 23 and May 23 by Rancourt after he completed his cross-examinations, do not meet the tests set out above in *First Capital*

Realty Inc., *supra*. Firstly, the evidence contained in the affidavits is not relevant to the issues identified in Rancourt's motion and affidavit materials filed in January 2012. This issue has already been decided by Beaudoin J. and leave to appeal denied. Secondly, the evidence contained in the two affidavits does not respond to a matter raised in the cross-examinations, nor does it respond to the evidence given by Mr. Giroux on his cross-examination. The only exhibit related to Mr. Giroux's cross-examination is an irrelevant article written by a University of Waterloo professor about Rancourt's dismissal (Exhibit D). In his case conference decision of April 2, 2012, Beaudoin J. permitted Rancourt to file a further affidavit only in response to Mr. Giroux's examination. I would allow Rancourt's April 23, 2012 affidavit to be filed but only as it relates to Exhibit D. However, I also find that Exhibit D is irrelevant hearsay evidence which is not relevant to the champerty motion.

[56] Thirdly, the evidence attached to Rancourt's affidavit consists of documents put to witnesses during cross-examination which the witnesses objected to or did not recognize. Rancourt had all of these documents in his possession before the cross-examination took place. I agree with the University's submissions that a party cannot "bootstrap the admissibility of a subsequent affidavit by putting the evidence in that affidavit to a witness in cross-examination and using that witness' proper refusal or lack of knowledge to form the basis for its subsequent admissibility."

[57] Finally, I find that the University would suffer prejudice if the issues as pleaded in the motion filed in January 2012 were changed by filing new affidavits raising additional issues after cross-examinations were completed. Rancourt has not provided any reasonable or adequate explanation for why the evidence he attached to his April and May affidavits was not included in his affidavit and materials filed in January 2012, as these materials were in his possession before he cross-examined President Rock.

[58] Even if the April 23rd and May 23rd affidavits were admitted as evidence of the exhibits attached to the affidavits, I find that the exhibits (other than Exhibit D) consist of copies of e-mails to or from Allan Rock which indicate that Allan Rock disagreed with certain actions or statements made by Rancourt. This evidence is not surprising as President Rock decided to terminate Rancourt's employment as a professor in 2009, because President Rock and the University disagreed with Rancourt's conduct as a professor. However, the attached exhibits do not constitute evidence that the University agreed to fund St. Lewis' defamation action for improper reasons. To suggest that the e-mails attached as exhibits to the April 23rd and May 23rd affidavits constitute evidence of an improper motive by the University for funding St. Lewis' defamation action is pure speculation on Rancourt's part.

Disposition of the admissibility of the April 23 and May 23, 2012 affidavits

[59] For the above reasons, I find that the April 23 and May 23, 2012 affidavits filed by Rancourt are inadmissible on the champerty motion and even if they were admissible they do not constitute relevant evidence of an improper motive of the University but are mere speculation.

Issue #2 Should a trial of an issue be ordered?

[60] In his factum, Rancourt requests that the issue of staying St. Lewis' action as an abuse of process on the basis of maintenance and champerty be disposed of by a trial of an issue pursuant to Rule 37.13(2)(b).

[61] St. Lewis submits that this is yet another attempt by Rancourt to delay the determination of his champerty motion, and is contrary to his previous representations to the Court that his champerty, maintenance and abuse of process motion had to be decided prior to trial because it could end the litigation.

[62] At the May 4, 2012 case management conference, Beaudoin J. set August 29, 2012 for Rancourt's champerty motion to be heard. The August 29th hearing date was cancelled due to Rancourt's allegations of bias against Beaudoin J. After I was appointed as the case management judge, I set the date of December 13, 2012 to hear Rancourt's champerty motion. This date was set at a case conference held on September 27, 2012.

[63] Rancourt did not give any notice to the responding parties prior to November 30, 2012 when he filed his factum that he would seek an order directing a trial of the maintenance and champerty issues rather than having his motion heard. Rancourt seeks to change his prior submissions that the champerty and abuse of process issues had to be decided prior to trial. He seeks to change his position and argue that this matter should be decided at trial or by a trial of an issue.

[64] Rule 21.01(3)(d) reads as follows:

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

...

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court, and the judge may make an order or grant judgment accordingly.

[65] Rule 37.13(2) reads as follows:

A judge who hears a motion may,

- (a) in proper case, order that the motion be converted into a motion for judgment; or
- (b) order the trial of an issue, with such directions as are just, and adjourn the motion to be disposed of by the trial judge. R.R.O. 1990, Reg. 194, r. 37.13 (2).

[66] Rancourt brought this motion in January 2012 seeking to stay or dismiss St. Lewis' defamation action as an abuse of process based on champerty and maintenance. All parties have

filed numerous affidavits, the responding parties have been cross-examined on their affidavits, a refusals motion was brought by Rancourt with regards to the University's affiant's refusal to answer certain questions, the date to hear the champerty motion was set for August 29, 2012 and then adjourned due to an allegation of bias against Beaudoin J. and rescheduled to December 13, 2012.

[67] Rancourt's first objection to this motion being heard and his request that the court order a trial of the issue, pursuant to Rule 37.13(2)(b) and (3) was in his factum dated and filed on November 30, 2012. This factum was delivered approximately 11 months after Rancourt had commenced this motion and after the motion date had been set for August 29th and then adjourned to December 13th for a full day hearing. In addition, the motion has now been fully argued by the parties.

[68] Rule 1.04 requires that the Rules "be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."

[69] Rancourt now submits that there is conflicting material evidence, in which credibility is an essential feature, which he submits requires a trial of an action to resolve.

[70] Rancourt submits that main material conflict in the evidence is that President Rock has given sworn evidence that the University's motive for funding the plaintiff's litigation were proper. Rancourt alleges that a possible animus of President Rock towards him because of his dismissal as a Professor in 2009 constitutes evidence of an improper motive for the University to pay legal costs of one of its employees, St. Lewis, to pursue a defamation action against him.

[71] The University and St. Lewis submit that there is no evidence of an improper motive for the University's decision to fund St. Lewis' defamation action because Beaudoin J. has held that the issues raised in the April 23rd and May 23rd affidavits are not relevant and as such, they are not admissible. I have held that Beaudoin J. has already decided this and I have not admitted the affidavits.

[72] Rancourt submits that the University's real motive for funding St. Lewis' defamation action against him was to persecute or harm him. Beaudoin J. has already ruled that the evidence by which Rancourt sought to establish the "real motive for the University funding the litigation of the Plaintiff is to persecute, harm, and/or suppress the Defendant and, as such, that the action is vexatious and an abuse of process" was irrelevant and inadmissible on his champerty motion. As a result of his finding, this issue has been decided by Beaudoin J. and therefore, I find that there is no material conflict in the evidence which requires a trial of an issue.

[73] Even if the affidavits of April 23rd and May 23, 2012 were admitted, I conclude that there is no conflict in the material evidence related to the plaintiff's motive for commencing litigation against Rancourt. The plaintiff's uncontradicted evidence is that she decided to commence action against Rancourt to protect her reputation and that decision was not made by the University.

[74] With regards to Rancourt's submission that there is a conflict in the evidence over President Rock's motive for funding St. Lewis' defamation action, I find that even if the subsequent affidavits were considered, there is simply no evidence that Rancourt has produced

showing that the University had an improper motive for funding an employee's defamation action other than his speculation about a possible improper motive because he is in a labour dispute with the University.

[75] I am also not satisfied that there is a conflict in the evidence related to the motive by President Rock. He has sworn an affidavit setting forth his reasons for agreeing to fund St. Lewis' defamation action. He has been cross-examined on his affidavit and no contradictions have arisen from President Rock's cross-examination that would warrant a trial of this issue.

[76] I also find that to order a trial of an issue after extensive cross-examinations were conducted, where the parties have spent time and incurred substantial expense over an 11 month period, where Rancourt has changed his approach and now seeks to have his motion turned into a trial of an issue would be inconsistent with the principles set out in Rule 1.04. Rancourt's request to convert his motion into a trial of an issue would create unnecessary expense and delay and is not necessary to secure a just result because the issues have already been defined by Rancourt in his January motion materials and the respondents in their responding affidavits as confirmed by Beaudoin J.'s decision. There is only mere speculation by Rancourt that the University agreed to fund St. Lewis' defamation action for an improper purpose or improper motive.

Disposition of Issue #2

[77] For the above reasons, a trial of the issues raised in this motion will not be ordered.

Issue #3 Does the University's agreement to pay for St. Lewis' legal costs of her defamation action against Rancourt constitute champerty and maintenance?

Maintenance

[78] Maintenance is defined as the officious intermeddling in the litigation of others for an improper purpose. At p. 157, in the *Introduction to the Canadian Law of Torts*, G.H.L. Fridman 2nd ed., LexisNexis, Canada, 2003, the author states as follows:

Maintenance is the officious intermeddling in the litigation of others, for an improper motive, when the maintainer has no personal interest in such litigation and the assistance, which usually takes the form of financial support, is unjustified. Champerty occurs when, in return for such support, the parties to the arrangement agree that any profits of the action will be shared between them. Champerty is an "aggravated" or "egregious" form of maintenance, in which there is the added element that the maintainer shares the profits of the litigation. Without maintenance there can be no champerty.

[79] In *The Law of Civil Procedure in Ontario*, Morden and Perell, 1st ed., LexisNexis, Toronto, 2010, at pages 72-73 the authors state that maintenance and champerty were torts and state as follows:

The presence of maintenance or champerty may be a bar to a proceeding. Maintenance and champerty are torts, and they were once regarded as criminal

offences. The gravamen of these torts is a person's officious intermeddling or profiteering in another person's lawsuit. ... An action that involves maintenance or champerty may be dismissed as an abuse of process. (*Operation 1 Inc. v. Phillips*, [2004] O.J. No. 5290 (Ont. S.C.J.) and *Wong v. Second Cup Ltd.*, [2005] O.J. No. 2897 (Ont. Master))

[80] At page 73, Morden and Perell write:

The focus of attention of maintenance ... There is no maintenance unless there is an improper motive, (*Lorch v. McHale*, [2008] O.J. No. 2807, 92 O.R. (3d) 305 (Ont. S.C.J.); *S. v. K.*, [1986] O.J. No. 3035, 55 O.R. (2d) 111 (Ont. Dist. Ct.)) and there is no maintenance if the alleged maintainer has a legitimate reason or justification for assisting the litigant. (*Lorch v. McHale*, *supra*; *Morgan v. Steffanini*, [2005] O.J. No. 1606 (Ont. S.C.J.); *Ingle v. ACA Assurance*, [2005] O.J. No. 4653 (Ont. S.C.J.))

[81] In *McIntyre Estate v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257 (Ont. C.A.) at para. 34, the Court of Appeal stated as follows on the subject of maintenance:

For there to be maintenance the person allegedly maintaining an action or proceeding must have an improper motive which motive may include, but is not limited to, officious intermeddling or stirring up strife. There can be no maintenance if the alleged maintainer has a justifying motive or excuse.

[82] To summarize the above cases and statements, in order to succeed on his motion to obtain a stay of the action as an abuse of process based on maintenance and champerty, Rancourt must show that:

- (a) there has been officious intermeddling by the University, namely, that the University has funded St. Lewis' defamation action that she would not have otherwise pursued;
- (b) the University did not have a legitimate reason or justification for assisting St. Lewis by providing funding; and
- (c) the University had an improper motive for funding St. Lewis' libel action.

(a) *Officious intermeddling*

[83] The uncontradicted evidence of St. Lewis and Dean Feldthusen was that St. Lewis had decided to sue Rancourt for defamation before she asked the University to pay for her legal fees to do so. Dean Feldthusen supported St. Lewis' request for funding and arranged a meeting with the President of the University. President Allan Rock agreed, on behalf of the University, to pay St. Lewis' legal costs to sue Rancourt for defamation to protect her reputation as an employee of the University.

[84] In *Hill v. Church of Scientology of Toronto*, [1992] O.J. No. 451 (S.C.J.), *aff'd* [1995] 2 S.C.R. 1130, the Supreme Court of Canada found no impropriety in the Government of Ontario

funding an employee's libel action against a private entity. The University of Ottawa is a private entity and is not a governmental body, however, does receive grants from governments.

[85] The reason the University agreed to pay St. Lewis' legal costs for her libel action were set out in a letter from the University's counsel, David Scott, which were referred to in the facts above. The relevant parts of the University's reasons were that the alleged defamatory remarks about St. Lewis were occasioned by work, which she undertook at the request of the University and in the course of her duties and responsibilities as an employee of the University. Her efforts were not personal but in the interest of the University. Furthermore, the racist attack upon her took this case out of the ordinary and in the view of the University created a moral obligation to provide support for her in defence of her reputation.

[86] The uncontradicted evidence before me is that the University agreed to pay an employee's legal fees, in this case, Professor St. Lewis, to fund her libel action which was commenced to defend her reputation. I therefore find that the University's agreement to fund an employee's defamation action does not, as was the case in *Hill v. Church of Scientology of Toronto*, *ibid*, constitute officious intermeddling in litigation as St. Lewis had decided to sue Rancourt for libel to protect her reputation before the University agreed to fund her legal fees.

(b) and (c) *Legitimate reason or justification for assisting St. Lewis or improper purpose*

[87] Rancourt speculates and alleges that Allan Rock as President of the University had an improper motive for funding St. Lewis' libel action against him. He alleges that the University agreed to fund her defamation action in order to stigmatize and silence him after the University dismissed him from his full tenured professorship on April 1, 2009.

[88] There can be no maintenance if the University had a legitimate reason or justification for assisting the litigant. The evidence is uncontradicted from President Rock, Mr. Giroux, Dean Feldthusen and St. Lewis that, the University's reasons for assisting St. Lewis by paying her legal fees, was to defend her reputation. The reasons were set out in the letter from its counsel, David Scott, namely, because her reputation was attacked during the course of her employment by the University and also because the University felt that it had a moral obligation to assist her to defend her reputation in these special circumstances from a racist attack.

[89] In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, the Supreme Court of Canada made several comments about the fact that the Ontario Government paid for the legal fees for the Crown Attorney, S. Casey Hill, to sue the Church of Scientology for libel. Similar allegations to those made by Rancourt were levelled at the Ontario Government. Paragraph 70 of the *Hill* decision reads as follows:

They further submit that Casey Hill commenced these legal proceedings at the direction and with the financial support of the Attorney General in order to vindicate the damage to the reputation of the Ministry resulting from criticism levelled at the conduct of one of its officials. It is, therefore, contended that this action represents an effort by a government department to use the action of

defamation to restrict and infringe the freedom of expression of the appellants in a manner that is contrary to the Charter.

[90] At para. 71, the Supreme Court states that “These submissions cannot be accepted. They have no legal, evidentiary or logical basis of support.” At para. 75, the Court continued by stating that “The appellants impugned the character, competence and integrity of Casey Hill, himself, and not that of the government. He, in turn, responded by instituting legal proceedings in his own capacity.”

[91] In *Hill v. Church of Scientology of Toronto*, *ibid*, the Government of Ontario paid for the legal costs for one of its Crown Attorney, S. Casey Hill, to fund a libel action against the Church of Scientology. Rancourt is speculating that the University had other improper motives, namely to silence him. However, they are not supported by any evidence as his allegation denied by President Rock, by St. Lewis, by Dean Feldthusen and by Mr. Giroux. The University does not deny that it terminated Rancourt and he is involved in a labour arbitration with his union to determine whether his dismissal was justified. This is a separate issue and does not constitute evidence of an improper motive on the part of the University.

[92] Rancourt’s speculation that the University agreed to pay St. Lewis’ legal costs of her defamation action in order to silence and stigmatize him is unsupported by any evidence. Even if the April 23rd and May 23rd affidavits were considered, I find that the evidence introduced by Rancourt does not contradict the evidence of Mr. Rock, Ms. Lewis, Dean Feldthusen or Mr. Giroux, with regards with the reasons that the University agreed to fund St. Lewis’ defamation action against the defendant. As a result, there is no issue of credibility on these matters that require a trial of an issue.

[93] The situation for St. Lewis is very similar to those in the case of *Hill v. Church of Scientology* as St. Lewis was an employee and made her own decision to commence a libel action to defend her reputation and the University, as her employer, agreed to pay for her legal costs because her reputation was damaged in the course of her employment. I find that the University had a legitimate reason for assisting St. Lewis and there is no evidence that the University agreed to fund St. Lewis’ libel action for an improper purpose or based on an improper motive.

Champerty

[94] As set out in para. [78] of this decision:

Champerty is an “aggravated” or “egregious” form of maintenance, in which there is the added element that the maintainer shares the profits of the litigation.

[95] The uncontradicted evidence before me is that there was never any agreement between St. Lewis and the University to share in the proceeds of the libel action. The University agreed to fund St. Lewis’ costs to pursue a defamation action against Rancourt to defend her reputation at the meeting of April 15, 2011 without any agreement that the University would share in the proceeds of the litigation.

[96] Professor St. Lewis decided, when issuing her statement of claim, that half of any punitive damages awarded would be paid to a scholarship fund. Her statement of claim was issued after the University agreed to pay for her legal costs, St. Lewis' unilateral decision to donate a share of the punitive damages awarded to a scholarship fund administered through the University does not constitute a contractual agreement to share in the proceeds. This proposal could be unilaterally revoked by St. Lewis at any time.

[97] I therefore find that the University's agreement to fund St. Lewis' defamation action did not constitute champerty because there was no agreement that the University would share in the proceeds of the action.

Was there trafficking in litigation?

[98] In *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1785, at para. 8, Strathy J. dismissed a defendant's claim that a third party funding agreement in a class action was champertous and unlawful under *An Act respecting Champerty*, R.S.O. 1897, c. 327.

[99] At para. 33, Strathy J. stated:

- (a) ...Just as contingency fee agreements have been recognized as providing access to justice, so too third party indemnity agreements can avoid the unfortunate result that individuals with potentially meritorious claims cannot bring them because they are unable to withstand the risk of loss: see *McIntyre Estate* at para. 55.
- (b) There is no evidence that CFI stirred up, incited or provoked this litigation, within the meaning of the term “moved” in s. 1 of the *Champerty Act*: see *McIntyre Estate* at para. 41. On the contrary, the plaintiffs demonstrated a clear intention to proceed with this litigation before CFI came on the scene.

[100] In this case, St. Lewis advised Dean Feldthusen that she had to sue Rancourt for defamation and requested that the University provide funding for her legal costs.

[101] An action will be dismissed as being frivolous and vexatious or abusive under Rule 21.03(3)(d) only in the clearest of the cases if on the face of the action and in circumstances where it is plain and obvious that the case cannot succeed. In *Sussman v. Ottawa Sun*, [1997] O.J. No. 181, (Ont. Gen. Div.), the court held that the maintenance and champerty were not defences to an action and as such, pleas will not be struck out.

[102] In *Operation 1 Inc. v. Phillips*, 2004 CanLII 48689 (ON SC), at paras. 45 and 47, Cullity J. held that an action will rarely be stayed or dismissed as an abuse of process based on a champertous agreement. He held that the champerty must rise to a level of “trafficking in litigation”, namely be an “unjustified buying and selling of rights to litigation where the purchaser has no proper reason to be concerned with the litigation”, to be considered an abuse of process, even then a stay will not necessarily be granted.

[103] I find the University’s agreement to fund St. Lewis’ libel action does not constitute trafficking in litigation because St. Lewis had already decided to sue to protect her reputation and there is no evidence of the University buying or selling rights to litigation as it did not even have an agreement to share in the proceeds of the action.

Disposition of Issue #3

[104] I find that when the University agreed to pay for St. Lewis’ legal fees for her defamation action as an employee to assist her to defend her reputation, which was allegedly damaged in the course of her employment for the University, does not constitute officious intermeddling, is a legitimate reason or justification for assisting her and does not constitute an improper purpose. I have found that the University did not enter into an agreement to share in the proceeds of litigation, and as a result, I find there is no champerty. For the same reason, the University’s agreement to fund the costs of the libel action does not rise to the level of trafficking in litigation as there was no purchase or sale of rights to the libel action by the University.

Disposition of Motion

[105] Rancourt's motion to stay or dismiss the action on the basis that the agreement of the University to fund St. Lewis' defamation action was the product of maintenance and champerty is dismissed.

Costs

[106] The plaintiff and the University shall have fifteen (15) days to make submissions on costs, the defendant Rancourt shall have fifteen (15) days to respond and St. Lewis and the University shall have ten (10) days to reply.

Mr. Justice Robert J. Smith

Released: March 13, 2013

CITATION: St. Lewis v. Rancourt, 2013 ONSC 1564
COURT FILE NO.: 11-51657
DATE: 2013/03/13

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Joanne St. Lewis

Plaintiff

– and –

Denis Rancourt

Defendant

University of Ottawa

Rule 37 Affected Party

**REASONS FOR DECISION ON THE
CHAMPERTY MOTION**

R. Smith J.

Released: March 13, 2013

Mary Danyluk *Appellant*Mary Danyluk *Appelante*

TAB 10

v.

c.

Ainsworth Technologies Inc., Ainsworth Electric Co. Limited, F. Jack Purchase, Paul S. Gooderham, Jack A. Taylor, Ross A. Pool, Donald W. Roberts, Timothy I. Pryor, Clifford J. Ainsworth, John F. Ainsworth, Kenneth D. Ainsworth, Melville O'Donohue, Donald J. Hawthorne, William I. Welsh and Joseph McBride Watson *Respondents*

Ainsworth Technologies Inc., Ainsworth Electric Co. Limited, F. Jack Purchase, Paul S. Gooderham, Jack A. Taylor, Ross A. Pool, Donald W. Roberts, Timothy I. Pryor, Clifford J. Ainsworth, John F. Ainsworth, Kenneth D. Ainsworth, Melville O'Donohue, Donald J. Hawthorne, William I. Welsh et Joseph McBride Watson *Intimés*

INDEXED AS: DANYLUK v. AINSWORTH TECHNOLOGIES INC.

RÉPERTOIRÉ : DANYLUK c. AINSWORTH TECHNOLOGIES INC.

Neutral citation: 2001 SCC 44.

Référence neutre : 2001 CSC 44.

File No.: 27118.

N° du greffe : 27118.

2000: October 31; 2001: July 12.

2000 : 31 octobre; 2001 : 12 juillet.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

Présents : Le juge en chef McLachlin et les juges Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Administrative law — Issue estoppel — Employee filing complaint against employer under Employment Standards Act seeking unpaid wages and commissions — Employee subsequently commencing court action against employer for wrongful dismissal and unpaid wages and commissions — Employment standards officer dismissing employee's complaint — Employer arguing that employee's claim for unpaid wages and commissions before court barred by issue estoppel — Whether officer's failure to observe procedural fairness in deciding employee's complaint preventing application of issue estoppel — Whether preconditions to application of issue estoppel satisfied — If so, whether this Court should exercise its discretion and refuse to apply issue estoppel.

Droit administratif — Préclusion découlant d'une question déjà tranchée — Plainte déposée par une employée contre son employeur en vertu de la Loi sur les normes de l'emploi et réclamant le versement de salaire et commissions impayés — Action en dommages-intérêts pour congédiement injustifié et pour salaire et commissions impayés intentée subséquemment par l'employée contre l'employeur — Rejet de la plainte par l'agente des normes d'emploi — Préclusion découlant d'une question déjà tranchée plaidée par l'employeur à l'égard de la réclamation pour salaire et commissions impayés — L'inobservation de l'équité procédurale par l'agente des normes dans sa décision sur la plainte de l'employée empêche-t-elle l'application de cette doctrine? — Les conditions d'application de la préclusion découlant d'une question déjà tranchée sont-elles réunies? — Dans l'affirmative, notre Cour doit-elle exercer son pouvoir discrétionnaire et refuser d'appliquer cette doctrine?

In 1993, an employee became involved in a dispute with her employer over unpaid commissions. No agreement was reached, and the employee filed a complaint under the *Employment Standards Act* ("ESA") seeking

En 1993, un différend relatif à des commissions impayées a opposé une employée et son employeur. Aucune entente n'est intervenue et l'employée a déposé, en vertu de la *Loi sur les normes d'emploi* (la « LNE »),

unpaid wages, including commissions. The employer rejected the claim for commissions and eventually took the position that the employee had resigned. An employment standards officer spoke with the employee by telephone and met with her for about an hour. Before the decision was made, the employee commenced a court action claiming damages for wrongful dismissal and the unpaid wages and commissions. The ESA proceedings continued, but the employee was not made aware of the employer's submissions in the ESA claim or given an opportunity to respond to them. The ESA officer rejected the employee's claim and ordered the employer to pay her \$2,354.55, representing two weeks' pay in lieu of notice. She advised the employer of her decision and, 10 days later, notified the employee. Although she had no appeal as of right, the employee was entitled to apply under the ESA for a statutory review of this decision. She elected not to do so and carried on with her wrongful dismissal action. The employer moved to strike the part of the statement of claim that overlapped the ESA proceeding. The motions judge considered the ESA decision to be final and concluded that the claim for unpaid wages and commissions was barred by issue estoppel. The Court of Appeal affirmed the decision.

Held: The appeal should be allowed.

Although, in general, issue estoppel is available to preclude an unsuccessful party from relitigating in the courts what has already been litigated before an administrative tribunal, this is not a proper case for its application. Finality is a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a public policy doctrine designed to advance the interests of justice. Where, as here, its application bars the courthouse door against a claim because of an administrative decision made in a manifestly improper and unfair manner, a re-examination of some basic principles is warranted.

une plainte dans laquelle elle réclamait le versement de salaire impayé, y compris des commissions. L'employeur a rejeté sa demande de commissions et a finalement considéré qu'elle avait remis sa démission. Une agente des normes d'emploi a eu un entretien téléphonique avec l'employée, qu'elle a ensuite rencontrée pendant environ une heure. Avant que la décision soit rendue, l'employée a intenté une action en dommages-intérêts pour congédiement injustifié dans laquelle elle demandait le paiement du salaire et des commissions. La procédure prévue par la LNE a suivi son cours, mais l'employée n'a pas été avisée des arguments invoqués par l'employeur au sujet de sa plainte et elle n'a pas eu la possibilité d'y répondre. L'agente des normes d'emploi a rejeté la réclamation de l'employée et a ordonné à l'employeur de verser à cette dernière la somme de 2 354,55 \$, soit deux semaines de salaire, à titre d'indemnité de préavis. Elle a informé l'employeur de sa décision et, 10 jours plus tard, elle en a avisé l'employée. L'employée ne pouvait interjeter appel de plein droit mais elle avait, en vertu de la LNE, le droit de demander la révision de cette décision. Elle a choisi de ne pas le faire et a plutôt poursuivi son action en dommages-intérêts pour congédiement injustifié. L'employeur a présenté une requête en radiation de la partie de la déclaration qui recouvrait la procédure engagée en vertu de la LNE. Le juge des requêtes a considéré que la décision fondée sur la LNE était définitive et il a conclu que la préclusion découlant d'une question déjà tranchée faisait obstacle à la réclamation pour salaire et commissions impayés. La Cour d'appel a confirmé la décision.

Arrêt : Le pourvoi est accueilli.

Bien que, en règle générale, la préclusion découlant d'une question déjà tranchée (*issue estoppel*) puisse être invoquée pour empêcher une partie déboutée de saisir les cours de justice d'une question qu'elle a déjà plaidée sans succès devant un tribunal administratif, il ne s'agit pas en l'espèce d'une affaire où il convient d'appliquer cette doctrine. Le caractère définitif des instances est une considération impérieuse et, en règle générale, une décision judiciaire devrait trancher les questions litigieuses de manière définitive, tant qu'elle n'est pas infirmée en appel. Toutefois, la préclusion est une doctrine d'intérêt public qui tend à favoriser les intérêts de la justice. Dans les cas où, comme en l'espèce, par suite d'une décision administrative prise à l'issue d'une procédure qui était manifestement inappropriée et inéquitable, l'application de cette doctrine empêche le recours aux cours de justice, il convient de réexaminer certains principes fondamentaux.

The preconditions to the operation of issue estoppel are threefold: (1) that the same question has been decided in earlier proceedings; (2) that the earlier judicial decision was final; and (3) that the parties to that decision or their privies are the same in both the proceedings. If the moving party successfully establishes these preconditions, a court must still determine whether, as a matter of discretion, issue estoppel ought to be applied.

The preconditions require the prior proceeding to be judicial. Here, the ESA decision was judicial. First, the administrative authority issuing the decision is capable of receiving and exercising adjudicative authority. Second, as a matter of law, the decision was required to be made in a judicial manner. While the ESA officers utilize procedures more flexible than those that apply in the courts, their adjudicative decisions must be based on findings of fact and the application of an objective legal standard to those facts.

The appellant denies the applicability of issue estoppel because, as found by the Court of Appeal, the ESA decision was taken without proper notice to the appellant and she was not given an opportunity to meet the employer's case. It is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. Where an administrative officer or tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law governing judicial review in *Harelkin* and collateral attack in *Maybrun*.

In this case, the pre-conditions for issue estoppel have been met: the same issue is raised in both proceedings, the decision of the ESA officer was final for the purposes of the Act since neither the employer nor the employee took advantage of the internal review procedure, and the parties are identical. The Court must therefore decide whether to refuse to apply estoppel as a mat-

Les conditions d'application de la préclusion découlant d'une question déjà tranchée sont au nombre de trois : (1) que la même question ait été décidée dans une procédure antérieure; (2) que la décision judiciaire antérieure soit définitive; (3) que les parties ou leurs ayants droit soient les mêmes dans chacune des instances. Si le requérant réussit à établir l'existence des conditions d'application, la cour doit ensuite se demander, dans l'exercice de son pouvoir discrétionnaire, si cette forme de préclusion devrait être appliquée.

Suivant ces conditions, la décision antérieure doit être une décision judiciaire. En l'espèce, la décision fondée sur la LNE était judiciaire. Premièrement, le décideur administratif ayant rendu la décision peut être investi d'un pouvoir juridictionnel et il est capable d'exercer ce pouvoir. Deuxièmement, sur le plan juridique, la décision devait être prise judiciairement. Bien que les agents des normes d'emploi aient recours à des procédures plus souples que celles des cours de justice, leurs décisions juridictionnelles doivent s'appuyer sur des conclusions de fait et sur l'application à ces faits d'une norme juridique objective.

L'appelante conteste l'application de la préclusion découlant d'une question déjà tranchée parce que, conformément à la conclusion de la Cour d'appel, la décision fondée sur la LNE a été rendue sans qu'on donne à l'appelante un préavis suffisant et la possibilité de répondre aux prétentions de l'employeur. Il est clair qu'une décision administrative qui a au départ été prise sans la compétence requise ne peut fonder l'application de la préclusion. Lorsque le décideur administratif — fonctionnaire ou tribunal — avait initialement compétence pour rendre une décision de manière judiciaire, mais a commis une erreur dans l'exercice de cette compétence, la décision rendue est néanmoins susceptible de fonder l'application de la préclusion. Les erreurs qui auraient été commises dans l'accomplissement du mandat doivent être prises en considération par la cour de justice dans l'exercice de son pouvoir discrétionnaire. Cela a pour effet d'assurer la conformité du principe régissant la préclusion avec les règles de droit relatives au contrôle judiciaire énoncées dans l'arrêt *Harelkin* et celles relatives aux contestations indirectes énoncées dans l'arrêt *Maybrun*.

En l'espèce, les conditions d'application de la préclusion découlant d'une question déjà tranchée sont réunies : la même question est à l'origine des deux instances, la décision de l'agente des normes avait un caractère définitif pour l'application de la Loi en raison du fait que ni l'employeur ni l'employée ne se sont prévalus du mécanisme de révision interne, et les parties

ter of discretion. Here this Court is entitled to intervene because the lower courts committed an error of principle in failing to address the issue of the discretion. The list of factors to be considered with respect to its exercise is open. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice, but not at the cost of real injustice in the particular case. The factors relevant to this case include the wording of the statute from which the power to issue the administrative order derives, the purpose of the legislation, the availability of an appeal, the safeguards available to the parties in the administrative procedure, the expertise of the administrative decision maker, the circumstances giving rise to the prior administrative proceeding and, the most important factor, the potential injustice. On considering the cumulative effect of the foregoing factors, the Court in its discretion should refuse to apply issue estoppel in this case. The stubborn fact remains that the employee's claim to commissions worth \$300,000 has simply never been properly considered and adjudicated.

sont les mêmes. La Cour doit par conséquent décider si elle doit exercer son pouvoir discrétionnaire et refuser d'appliquer la préclusion. En l'espèce, notre Cour a le droit d'intervenir puisque les tribunaux de juridiction inférieure ont commis une erreur de principe en omettant d'examiner la question de l'exercice du pouvoir discrétionnaire. La liste des facteurs à considérer pour l'exercice de ce pouvoir n'est pas exhaustive. L'objectif est de faire en sorte que l'application de la préclusion découlant d'une question déjà tranchée favorise l'administration ordonnée de la justice, mais pas au prix d'une injustice dans une affaire donnée. Parmi les facteurs pertinents en l'espèce, mentionnons : le libellé du texte de loi accordant le pouvoir de rendre l'ordonnance administrative, l'objet du texte de la loi, l'existence d'un droit d'appel, les garanties offertes aux parties dans le cadre de l'instance administrative, l'expertise du décideur administratif, les circonstances ayant donné naissance à l'instance administrative initiale et, facteur le plus important, le risque d'injustice. Vu l'effet cumulatif des facteurs susmentionnés, la Cour, dans l'exercice de son pouvoir discrétionnaire, doit refuser d'appliquer en l'espèce la préclusion découlant d'une question déjà tranchée. En effet, le fait demeure que la réclamation de l'employée visant des commissions totalisant 300 000 \$ n'a tout simplement jamais été examinée et tranchée adéquatement.

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APPEAL from a judgment of the Ontario Court of Appeal (1998), 42 O.R. (3d) 235, 167 D.L.R. (4th) 385, 116 O.A.C. 225, 12 Admin. L.R. (3d) 1, 41 C.C.E.L. (2d) 19, 27 C.P.C. (4th) 91, [1998] O.J. No. 5047 (QL), dismissing the appellant's appeal from a decision of the Ontario Court (General Division) rendered on June 10, 1996. Appeal allowed.

Howard A. Levitt and J. Michael Mulroy, for the appellant.

John E. Brooks and Rita M. Samson, for the respondents.

The judgment of the Court was delivered by

BINNIE J. — The appellant claims that she was fired from her position as an account executive with the respondent Ainsworth Technologies Inc. on October 12, 1993. She says that at the time of her dismissal she was owed by her employer some \$300,000 in unpaid commissions. The courts in Ontario have held that she is "estopped" from having her day in court on this issue because of an earlier failed attempt to claim the same unpaid monies under the *Employment Standards Act*, R.S.O. 1990, c. E.14 ("ESA" or "Act"). An employment standards officer, adopting a procedure which the Ontario Court of Appeal held to be improper and unfair, denied the claim. I agree that in general issue estoppel is available to preclude an unsuccessful party from relitigating in the courts what has already been unsuccessfully litigated before an administrative tribunal, but in my view this was not a proper case for its application. A judicial doctrine developed to serve the ends of justice

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Howard A. Levitt et J. Michael Mulroy, pour l'appelante.

John E. Brooks et Rita M. Samson, pour les intimés.

Version française du jugement de la Cour rendu par

LE JUGE BINNIE — L'appelante prétend que, le 12 octobre 1993, elle a été congédiée du poste de chargée de projet qu'elle occupait chez l'intimée Ainsworth Technologies Inc. Elle soutient que, au moment de son congédiement, son employeur lui devait quelque 300 000 \$ en commissions impayées. Les cours de justice ontariennes ont jugé que l'appelante était précluse (« *estopped* ») de saisir les tribunaux de ce différend en raison de sa tentative infructueuse d'obtenir le paiement de cette somme en vertu de la *Loi sur les normes d'emploi*, L.R.O. 1990, ch. E.14 (la « LNE » ou la « Loi »). Adoptant une procédure que la Cour d'appel de l'Ontario a jugé inappropriée et inéquitable, une agente des normes d'emploi a rejeté la demande de l'appelante. En règle générale, la préclusion découlant d'une question déjà tranchée (« *issue estoppel* ») peut, j'en conviens, être invoquée pour empêcher une partie déboutée de saisir les cours de justice d'une question qu'elle a déjà plaidée sans succès devant un tribunal administratif. Toutefois, je suis d'avis que la présente espèce

should not be applied mechanically to work an injustice. I would allow the appeal.

I. Facts

² In the fall of 1993, the appellant became involved in a dispute with her employer, the respondent Ainsworth Technologies Inc., over unpaid commissions. The appellant met with her superiors and sent various letters to them outlining her position. These letters were generally copied to her lawyer, Mr. Howard A. Levitt. Her principal complaint concerned an alleged entitlement to commissions of about \$200,000 in respect of a project known as the CIBC Lan project, plus other commissions which brought the total to about \$300,000.

³ The appellant rejected a proposed settlement from the employer. On October 4, 1993, she filed a complaint under the ESA seeking unpaid wages, including commissions. It is not clear on the record whether she had legal advice on this aspect of the matter. On October 5, the employer wrote to the appellant rejecting her claim for commissions and eventually took the position that she had resigned and physically escorted her off the premises.

⁴ An employment standards officer, Ms. Caroline Burke, was assigned to investigate the appellant's complaint. She spoke with the appellant by telephone and on or about January 30, 1994 met with her for about an hour. The appellant gave Ms. Burke various documents including her correspondence with the employer. They had no further meetings.

⁵ On March 21, 1994, more than six months after filing her claim under the Act, but as yet without an ESA decision, the appellant, through Mr. Levitt, commenced a court action in which she claimed

n'est pas une affaire où il convenait d'appliquer cette doctrine. Une doctrine élaborée par les tribunaux dans l'intérêt de la justice ne devrait pas être appliquée mécaniquement et donner lieu à une injustice. J'accueillerais le pourvoi.

I. Les faits

À l'automne 1993, un différend relatif à des commissions impayées a opposé l'appelante et son employeur, l'intimée Ainsworth Technologies Inc. L'appelante a rencontré ses supérieurs et elle leur a envoyé diverses lettres exposant son point de vue. Copie conforme de chacune de ces lettres était généralement transmise à son avocat, M^e Howard A. Levitt. L'appelante prétendait principalement avoir droit à environ 200 000 \$ à titre de commissions à l'égard d'un projet connu sous le nom de projet CIBC Lan, ainsi qu'à d'autres commissions portant à approximativement 300 000 \$ la somme totale réclamée.

L'appelante a rejeté le règlement proposé par l'employeur. Le 4 octobre 1993, elle a déposé, en vertu de la LNE, une plainte dans laquelle elle réclamait le versement de salaire impayé, y compris des commissions. Le dossier n'indique pas clairement si elle a profité des conseils d'un avocat sur cet aspect du litige. Le 5 octobre, l'employeur a écrit à l'appelante, lui indiquant qu'il rejetait sa demande visant les commissions. Subséquemment, lorsqu'elle s'est présentée au travail, il l'a fait conduire hors de ses locaux, considérant qu'elle avait remis sa démission.

On a demandé à une agente des normes d'emploi, M^{me} Caroline Burke, d'enquêter sur la plainte déposée par l'appelante. Madame Burke a d'abord eu un entretien téléphonique avec l'appelante puis, vers le 30 janvier 1994, elle l'a rencontrée pendant environ une heure. L'appelante a remis à M^{me} Burke divers documents, dont sa correspondance avec l'employeur. Aucune autre rencontre n'a eu lieu par la suite.

Le 21 mars 1994, plus de 6 mois après avoir déposé sa plainte en vertu de la Loi, mais sans qu'une décision ait encore été rendue à cet égard, l'appelante a intenté, par l'entremise de M^e Levitt,

damages for wrongful dismissal. She also claimed the unpaid wages and commissions that were already the subject-matter of her ESA claim.

On June 1, 1994, solicitors for the employer wrote to Ms. Burke responding to the appellant's claim. The employer's letter included a number of documents to substantiate its position. None of this was copied to the appellant. Nor did Ms. Burke provide the appellant with information about the employer's position; nor did she give the appellant the opportunity to respond to whatever the appellant may have assumed to be the position the employer was likely to take. The appellant, in short, was left out of the loop.

On September 23, 1994, the ESA officer advised the respondent employer (but not the appellant) that she had rejected the appellant's claim for unpaid commissions. At the same time she ordered the employer to pay the appellant \$2,354.55, representing two weeks' pay in lieu of notice. Ten days later, by letter dated October 3, 1994, Ms. Burke for the first time advised the appellant of the order made against the employer for two weeks' termination pay and the rejection of her claim for the commissions. The letter stated in part: "[w]ith respect to your claim for unpaid wages, the investigation revealed there is no entitlement to \$300,000.00 commission as claimed by you". The letter went on to explain that the appellant could apply to the Director of Employment Standards for a review of this decision. Ms. Burke repeated this advice in a subsequent telephone conversation with the appellant. The appellant did not apply to the Director for a review of Ms. Burke's decision; instead, she decided to carry on with her wrongful dismissal action in the civil courts.

The respondents contended that the claim for unpaid wages and commissions was barred by issue estoppel. They brought a motion in the appellant's civil action to strike the relevant paragraphs

une action en dommages-intérêts pour congédiement injustifié dans laquelle elle demandait également le paiement du salaire et des commissions impayés qui faisaient déjà l'objet de la plainte qu'elle avait présentée en vertu de la LNE.

Le 1^{er} juin 1994, les procureurs de l'employeur ont écrit à M^{me} Burke au sujet de la plainte de l'appelante. La lettre de l'employeur était accompagnée d'un certain nombre de documents étayant la thèse de ce dernier. Aucun de ces documents n'a été communiqué à l'appelante. Madame Burke n'a pas non plus fourni d'information à l'appelante relativement à la thèse de l'employeur et elle ne lui a pas donné la possibilité de répondre aux arguments qui, selon l'appelante, seraient vraisemblablement avancés par l'employeur. Bref, l'appelante a été tenue à l'écart.

Le 23 septembre 1994, l'agente des normes d'emploi a informé l'employeur intimé (mais non l'appelante) qu'elle avait rejeté la réclamation de l'appelante pour commissions impayées. Par contre, elle a ordonné à l'employeur de verser à l'appelante la somme de 2 354,55 \$, soit deux semaines de salaire, à titre d'indemnité de préavis. Dix jours plus tard, dans une lettre datée du 3 octobre 1994, M^{me} Burke a informé l'appelante de l'ordonnance intimant à l'employeur de lui verser deux semaines de salaire à titre d'indemnité de licenciement et du rejet de la réclamation visant les commissions. La lettre disait notamment ce qui suit : [TRADUCTION] « [r]elativement à votre réclamation pour salaire impayé, l'enquête a révélé que vous n'avez pas droit aux 300 000,00 \$ que vous réclamez à titre de commissions ». Elle ajoutait que l'appelante pouvait présenter au directeur des normes d'emploi une demande de révision de cette décision, information que M^{me} Burke a répétée lors d'un entretien téléphonique subséquent avec l'appelante. L'appelante n'a toutefois pas demandé la révision de la décision de M^{me} Burke, décidant plutôt de poursuivre son action en dommages-intérêts pour congédiement injustifié déposée au civil.

Les intimés ont invoqué la préclusion découlant d'une question déjà tranchée à l'encontre de la réclamation pour salaire et commissions impayés. Dans le cadre de l'instance civile engagée par l'ap-

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from the statement of claim. On June 10, 1996, McCombs J. of the Ontario Court (General Division) granted the respondents' motion. Only her claim for damages for wrongful dismissal was allowed to proceed. On December 2, 1998, the appellant's appeal was dismissed by the Court of Appeal for Ontario.

II. Judgments

A. *Ontario Court (General Division)* (June 10, 1996)

⁹ The issue before McCombs J. was whether the doctrine of issue estoppel applied in the present case. Following *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.), he concluded that issue estoppel could apply to issues previously determined by an administrative officer or tribunal. In his view, the sole issue to be determined was whether the ESA officer's decision was a final determination. The motions judge noted that the appellant did not seek to appeal or review the ESA officer's decision under s. 67(2) of the Act, as she was entitled to do if she wished to contest that decision. He considered the ESA decision to be final. The criteria for the application of issue estoppel were therefore met. The paragraphs relating to the appellant's claim for unpaid wages and commissions were struck from her statement of claim.

B. *Court of Appeal for Ontario* (1998), 42 O.R. (3d) 235

¹⁰ After reviewing the facts of the case, Rosenberg J.A. for the court identified, at pp. 239-40, the issues raised by the appellant's appeal:

This case concerns the second requirement of issue estoppel, that the decision which is said to create the estoppel be a final judicial decision. The appellant submits that the decision of an employment standards officer is neither judicial nor final. She also submits that, in any event, the process followed by Ms. Burke in this particular case was unfair and therefore her decision

pelante, ils ont présenté une requête en radiation des paragraphes pertinents de la déclaration. Le 10 juin 1996, le juge McCombs de la Cour de l'Ontario (Division générale) a accueilli cette requête. Seule la demande de dommages-intérêts pour congédiement injustifié a pu suivre son cours. Le 2 décembre 1998, la Cour d'appel de l'Ontario a rejeté l'appel formé par l'appelante.

II. Les décisions des juridictions inférieures

A. *Cour de l'Ontario (Division générale)* (10 juin 1996)

Le juge McCombs devait décider si la doctrine de la préclusion découlant d'une question déjà tranchée s'appliquait en l'espèce. S'appuyant sur l'arrêt *Rasanen c. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.), il a estimé que cette doctrine pouvait s'appliquer à une question déjà tranchée par un décideur administratif — fonctionnaire ou tribunal. Selon lui, la seule question à trancher était de savoir si la décision de l'agente des normes d'emploi était une décision définitive. Le juge des requêtes a souligné que l'appelante n'avait pas demandé la révision de la décision de l'agente des normes d'emploi ainsi que le lui permettait le par. 67(2) de la Loi. Il a considéré que la décision de l'agente des normes d'emploi était définitive. Les critères d'application de la doctrine de la préclusion découlant d'une question déjà tranchée étaient donc respectés. Les paragraphes de la déclaration de l'appelante ayant trait aux salaire et commissions impayés ont été radiés.

B. *Cour d'appel de l'Ontario* (1998), 42 O.R. (3d) 235

Après examen des faits de l'espèce, le juge Rosenberg, s'exprimant pour la Cour d'appel, a fait état des questions que soulevait l'appel aux p. 239-240 :

[TRADUCTION] La présente affaire porte sur la seconde condition d'application de la préclusion découlant d'une question déjà tranchée, savoir celle voulant que la décision qui, affirme-t-on, donne ouverture à la préclusion soit une décision judiciaire définitive. L'appelante prétend que la décision que rend un agent des normes d'emploi n'est ni judiciaire ni définitive. Elle soutient

should not create an estoppel. Specifically, the appellant argues she was not treated fairly as she was not provided with a copy of the submissions made by the employer and thus not given an opportunity to respond to those submissions.

In rejecting these submissions, Rosenberg J.A. grouped them under three headings: whether the ESA officer's decision was final; whether the ESA officer's decision was judicial; and the effect of procedural unfairness on the application of the doctrine of issue estoppel.

In his view, the decision of the officer in the present case was final because neither party exercised the right of internal appeal under s. 67(2) of the Act. Moreover, while not all administrative decisions that finally determine the rights of parties will be "judicial" for purposes of issue estoppel, Rosenberg J.A. found that the statutory procedure set out in the Act satisfied the requirements. He considered *Re Downing and Graydon* (1978), 21 O.R. (2d) 292 (C.A.), to be "determinative of this issue" (p. 249).

Lastly, Rosenberg J.A. addressed the issue of whether failure by the ESA officer to observe procedural fairness affected the application of the doctrine of issue estoppel in this case. He agreed that the ESA officer had in fact failed to observe procedural fairness in deciding upon the appellant's complaint. Nevertheless, this failure did not prevent the operation of issue estoppel (at p. 252):

The officer was required to give the appellant access to, and an opportunity to refute, any information gathered by the officer in the course of her investigation that was prejudicial to the appellant's claim. At a minimum, the appellant was entitled to a copy of the June 1, 1994 letter and a summary of any other information gathered in the course of the investigation that was prejudicial to her claim. She was also entitled to a fair opportunity to con-

également que, quoiqu'il en soit, la procédure suivie par Mme Burke en l'espèce était inéquitable et donc que sa décision ne devrait pas donner naissance à la préclusion. De façon plus particulière, l'appelante plaide qu'elle n'a pas été traitée équitablement puisqu'on ne lui a pas remis copie des observations de l'employeur et qu'on ne lui a pas, de ce fait, accordé la possibilité de les réfuter.

Le juge Rosenberg a rejeté les prétentions de l'appelante, qu'il a regroupées sous les trois questions suivantes : La décision de l'agente des normes d'emploi était-elle une décision définitive? Cette décision était-elle une décision judiciaire? Quel est l'effet d'une iniquité procédurale sur l'application de la doctrine de la préclusion découlant d'une question déjà tranchée?

Selon lui, la décision de l'agente était une décision définitive, étant donné que ni l'une ni l'autre des parties n'avaient exercé le droit d'appel interne prévu au par. 67(2) de la Loi. De plus, bien que les décisions administratives statuant définitivement sur les droits des parties ne soient pas toutes considérées comme « judiciaires » pour l'application de la doctrine de la préclusion découlant d'une question déjà tranchée, le juge Rosenberg a estimé que la procédure établie par la Loi respectait les conditions requises. Il a jugé que l'arrêt *Re Downing and Graydon* (1978), 21 O.R. (2d) 292 (C.A.), était [TRADUCTION] « décisif à cet égard » (p. 249).

Enfin, le juge Rosenberg s'est demandé si l'inobservation par l'agente des normes d'emploi des règles d'équité procédurale avait un effet en l'espèce sur l'application de la doctrine de la préclusion découlant d'une question déjà tranchée. Il a reconnu que l'agente des normes avait effectivement manqué à ces règles en statuant sur la plainte de l'appelante. Il a néanmoins jugé que ce manquement ne faisait pas obstacle à l'application de la doctrine (à la p. 252):

[TRADUCTION] L'agente était tenue de donner à l'appelante la possibilité de consulter et de réfuter toute information préjudiciable à sa réclamation recueillie par l'agente dans le cours de l'enquête. L'appelante aurait dû tout au moins recevoir copie de la lettre du 1^{er} juin 1994 ainsi qu'un résumé de toute autre information préjudiciable à sa réclamation recueillie dans le cours de l'enquête. Elle aurait également dû se voir accorder la

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sider and reply to that information. The appellant was denied the opportunity to know the case against her and have an opportunity to meet it: Ms. Burke failed to act judicially. In this particular case, this failure does not, however, affect the operation of issue estoppel.

possibilité d'examiner cette information et d'y répondre. L'appelante n'a pas reçu communication des allégations formulées contre elle et elle a été privée de la possibilité de les réfuter : M^{me} Burke n'a donc pas agi judiciairement. En l'espèce, toutefois, ce manquement n'empêche pas l'application de la doctrine de la préclusion découlant d'une question déjà tranchée.

- 14 In Rosenberg J.A.'s view, although ESA officers are obliged to act judicially, failure to do so in a particular case, at least if there is a possibility of appeal, will not preclude the operation of issue estoppel. This conclusion is based on the policy considerations underlying two rules of administrative law (at p. 252):

These two rules are: (1) that the discretionary remedies of judicial review will be refused where an adequate alternative remedy exists; and (2) the rule against collateral attack. These rules, in effect, require that the parties pursue their remedies through the administrative process established by the legislature. Where an appeal route is available the parties will not be permitted to ignore it in favour of the court process.

De l'avis du juge Rosenberg, même si les agents des normes d'emploi ont l'obligation d'agir judiciairement, le manquement à cette obligation dans un cas donné, du moins lorsqu'il est possible d'interjeter appel, ne fait pas obstacle à l'application de la préclusion découlant d'une question déjà tranchée. Sa conclusion s'appuie sur les considérations de politique d'intérêt général qui sont à la base de deux règles de droit administratif (à la p. 252):

[TRADUCTION] Ces deux règles sont les suivantes : (1) la règle écartant les recours discrétionnaires en matière de contrôle judiciaire lorsqu'il existe un autre recours approprié; (2) la règle prohibant les contestations indirectes. Dans les faits, ces règles exigent que les parties demandent réparation au moyen de la procédure administrative établie par le législateur. Lorsque les parties disposent d'une voie d'appel, elles ne sont pas admises à l'écarter pour s'adresser aux cours de justice.

- 15 Rosenberg J.A. noted that if the appellant had applied, under s. 67(3) of the Act for a review of the ESA officer's decision, the adjudicator conducting such a review would have been required to hold a hearing. This supported his view that the review process provided by the Act is an adequate alternative remedy. Rosenberg J.A. concluded, at p. 256:

In summary, Ms. Burke did not accord this appellant natural justice. The appellant's recourse was to seek review of Ms. Burke's decision. She failed to do so. That decision is binding upon her and her employer.

Le juge Rosenberg de la Cour d'appel a souligné que, si l'appelante avait demandé la révision de la décision de l'agente des normes d'emploi en vertu du par. 67(3) de la Loi, l'arbitre saisi de l'affaire aurait dû tenir une audience. Cette constatation étayait son opinion selon laquelle la procédure de révision prévue par la Loi constitue un autre recours approprié. Le juge Rosenberg a conclu ainsi, à la p. 256 :

[TRADUCTION] En résumé, M^{me} Burke n'a pas accordé à l'appelante le bénéfice des règles de justice naturelle. Le recours qui s'offrait à cette dernière était de demander la révision de la décision de l'agente. Elle ne l'a pas fait. Elle et son employeur sont liés par cette décision.

- 16 The court thus applied the doctrine of issue estoppel and dismissed the appellant's appeal.

La Cour d'appel a en conséquence appliqué la doctrine de la préclusion découlant d'une question déjà tranchée et a débouté l'appelante.

III. Relevant Statutory Provisions*Employment Standards Act*, R.S.O. 1990, c. E.14

1. In this Act,

. . . .

“wages” means any monetary remuneration payable by an employer to an employee under the terms of a contract of employment, oral or written, express or implied, any payment to be made by an employer to an employee under this Act and any allowances for room or board as prescribed in the regulations or under an agreement or arrangement therefor but does not include,

- (a) tips and other gratuities,
- (b) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and are not related to hours, production or efficiency,
- (c) travelling allowances or expenses,
- (d) contributions made by an employer to a fund, plan or arrangement to which Part X of this Act applies; (“salaire”)

. . . .

6. — (1) No civil remedy of an employee against his or her employer is suspended or affected by this Act.

(2) Where an employee initiates a civil proceeding against his or her employer under this Act, notice of the proceeding shall be served on the Director in the prescribed form on the same date the civil proceeding is set down for trial.

65. — (1) Where an employment standards officer finds that an employee is entitled to any wages from an employer, the officer may,

- (a) arrange with the employer that the employer pay directly to the employee the wages to which the employee is entitled;
- (b) receive from the employer on behalf of the employee any wages to be paid to the employee as the result of a compromise or settlement; or
- (c) issue an order in writing to the employer to pay forthwith to the Director in trust any wages to which an employee is entitled and in addition such order shall provide for payment, by the employer to the

III. Les dispositions législatives pertinentes*Loi sur les normes d'emploi*, L.R.O. 1990, ch. E.14

1 Les définitions qui suivent s'appliquent à la présente loi.

. . . .

« salaire » Rémunération en espèces payable par un employeur à un employé aux termes d'un contrat de travail, verbal ou écrit, exprès ou implicite, paiement qu'un employeur doit verser à un employé en vertu de la présente loi, et allocations de logement ou de repas prescrites par les règlements ou prévues par un accord ou un arrangement à cette fin, à l'exclusion des éléments suivants :

- a) les pourboires et autres gratifications,
- b) les sommes versées à titre de cadeaux ou de primes qui sont laissées à la discrétion de l'employeur et qui ne sont pas liées au nombre d'heures qu'un employé a travaillé, à sa production ou à son efficacité,
- c) les allocations ou indemnités de déplacement,
- d) les cotisations de l'employeur à une caisse, un régime ou un arrangement auxquels la partie X de la présente loi s'applique. (« wages »)

. . . .

6 (1) La présente loi ne suspend pas les recours civils dont dispose un employé contre son employeur ni n'y porte atteinte.

(2) Si un employé introduit une instance civile contre son employeur en vertu de la présente loi, l'avis d'instance est signifié au directeur, selon la formule prescrite, le jour même où l'instance civile est inscrite au rôle.

65 (1) Si l'agent des normes d'emploi conclut qu'un employé a le droit de percevoir un salaire d'un employeur, il peut, selon le cas :

- a) s'entendre avec l'employeur pour que celui-ci verse directement à l'employé le salaire auquel ce dernier a droit;
- b) recevoir de l'employeur, au nom de l'employé, le salaire qui doit être versé à ce dernier par suite d'une transaction;
- c) ordonner, par écrit, que l'employeur verse sans délai au directeur, en fiducie, le salaire auquel un employé a droit; il ordonne également à l'employeur de verser au directeur, à titre de frais d'administration, celle

Director, of administration costs in the amount of 10 per cent of the wages or \$100, whichever is the greater.

. . .

(7) If an employer fails to apply under section 68 for a review of an order issued by an employment standards officer, the order becomes final and binding against the employer even though a review hearing is held to determine another person's liability under this Act.

. . .

67. — (1) Where, following a complaint in writing by an employee, an employment standards officer finds that an employer has paid the wages to which an employee is entitled or has found that the employee has no other entitlements or that there are no actions which the employer is to do or is to refrain from doing in order to be in compliance with this Act, the officer may refuse to issue an order to an employer and upon refusing to do so shall advise the employee of the refusal by prepaid letter addressed to the employee at his or her last known address.

(2) An employee who considers himself or herself aggrieved by the refusal to issue an order to an employer or by the issuance of an order that in his or her view does not include all of the wages or other entitlements to which he or she is entitled may apply to the Director in writing within fifteen days of the date of the mailing of the letter mentioned in subsection (1) or the date of the issue of the order or such longer period as the Director may for special reasons allow for a review of the refusal or of the amount of the order.

(3) Upon receipt of an application for review, the Director may appoint an adjudicator who shall hold a hearing.

. . .

(5) The adjudicator who is conducting the hearing may with necessary modifications exercise the powers conferred on an employment standards officer under this Act and may make an order with respect to the refusal or an order to amend, rescind or affirm the order of the employment standards officer.

. . .

des deux sommes suivantes qui est la plus élevée, à savoir : 10 pour cent du salaire ou 100 \$.

. . .

(7) Si un employeur ne fait pas la demande visée à l'article 68 en vue de la révision d'une ordonnance rendue par un agent des normes d'emploi, l'ordonnance devient sans appel et lie l'employeur même si une audience en révision est tenue afin de déterminer l'obligation d'une autre personne aux termes de la présente loi.

. . .

67 (1) Si, à la suite d'une plainte par écrit d'un employé, l'agent des normes d'emploi conclut que l'employeur a versé à un employé le salaire auquel ce dernier a droit ou a conclu que l'employé n'a droit à rien d'autre ou qu'il n'y a rien que l'employeur doive faire ou s'abstenir de faire pour se conformer à la présente loi, il peut refuser de rendre une ordonnance visant l'employeur. Il en avise l'employé par lettre affranchie à sa dernière adresse connue.

(2) L'employé qui se croit lésé par le refus de l'agent de rendre une ordonnance contre l'employeur ou par une ordonnance qui, à son avis, ne comprend pas le salaire complet auquel il a droit ni ses autres droits peut, dans les quinze jours de la mise à la poste de la lettre visée au paragraphe (1) ou de la date où l'ordonnance a été rendue ou dans le délai plus long que le directeur peut autoriser pour des motifs particuliers, demander au directeur, par écrit, de réviser le refus ou le montant fixé dans l'ordonnance.

(3) Sur réception de la demande de révision, le directeur peut nommer un arbitre de griefs pour tenir une audience.

. . .

(5) L'arbitre de griefs qui tient l'audience peut exercer, avec les adaptations nécessaires, les pouvoirs que la présente loi confère à un agent des normes d'emploi, et peut rendre une ordonnance à l'égard du refus ou une ordonnance modifiant, annulant ou confirmant l'ordonnance de l'agent des normes d'emploi.

. . .

(7) The order of the adjudicator is not subject to a review under section 68 and is final and binding on the parties.

68. — (1) An employer who considers himself aggrieved by an order made under section 45, 48, 51, 56.2, 58.22 or 65, upon paying the wages ordered to be paid and the penalty thereon, if any, may, within a period of fifteen days after the date of delivery or service of the order, or such longer period as the Director may for special reasons allow and provided that the wages have not been paid out under subsection 72 (2), apply for a review of the order by way of a hearing.

. . . .

(3) The Director shall select a referee from the panel of referees to hear the review.

. . . .

(7) A decision of the referee under this section is final and binding upon the parties thereto and such other parties as the referee may specify.

IV. Analysis

The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of

(7) L'ordonnance de l'arbitre de griefs n'est pas susceptible de révision dans le cadre de l'article 68. Elle est sans appel et lie les parties.

68 (1) Après avoir versé le salaire qu'il lui est ordonné de payer ainsi que la somme à titre de pénalité qui s'y rapporte, s'il y a lieu, l'employeur qui s'estime lésé par une ordonnance rendue en vertu de l'article 45, 48, 51, 56.2, 58.22 ou 65 peut, dans les quinze jours qui suivent la remise ou la signification de l'ordonnance ou dans le délai plus long que le directeur peut autoriser pour des motifs particuliers, et à la condition que le salaire n'ait pas été versé en vertu du paragraphe 72 (2), demander que l'ordonnance fasse l'objet d'une révision par voie d'audience.

. . . .

(3) Le directeur choisit un arbitre au sein du tableau des arbitres pour tenir l'audience de révision.

. . . .

(7) La décision que l'arbitre prend en vertu du présent article est sans appel et lie les parties et les autres personnes que l'arbitre peut préciser.

IV. L'analyse

Le droit tend à juste titre à assurer le caractère définitif des instances. Pour favoriser la réalisation de cet objectif, le droit exige des parties qu'elles mettent tout en œuvre pour établir la véracité de leurs allégations dès la première occasion qui leur est donnée de le faire. Autrement dit, un plaideur n'a droit qu'à une seule tentative. L'appelante a décidé de se prévaloir du recours prévu par la LNE. Elle a perdu. Une fois tranché, un différend ne devrait généralement pas être soumis à nouveau aux tribunaux au bénéfice de la partie déboutée et au détriment de la partie qui a eu gain de cause. Une personne ne devrait être tracassée qu'une seule fois à l'égard d'une même cause d'action. Les instances faisant double emploi, les risques de résultats contradictoires, les frais excessifs et les procédures non décisives doivent être évités.

Le caractère définitif des instances est donc une considération impérieuse et, en règle générale, une décision judiciaire devrait trancher les questions litigieuses de manière définitive, tant qu'elle n'est pas infirmée en appel. Toutefois, la préclusion est

justice. Where as here, its application bars the courthouse door against the appellant's \$300,000 claim because of an administrative decision taken in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re-examination of some basic principles is warranted.

une doctrine d'intérêt public qui tend à favoriser les intérêts de la justice. Dans les cas où, comme en l'espèce, par suite d'une décision administrative prise à l'issue d'une procédure qui était manifestement inappropriée et inéquitable (conclusion tirée par la Cour d'appel elle-même), l'application de cette doctrine empêche l'appelante de s'adresser aux cours de justice pour réclamer les 300 000 \$ qui lui seraient dus, il convient de réexaminer certains principes fondamentaux.

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The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen* (1894), 22 S.C.R. 553, at p. 558; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmsted and G. D. Watson, *Ontario Civil Procedure* (loose-leaf), vol. 3 Supp., at 21§17 *et seq.* Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223.

Le droit s'est doté d'un certain nombre de moyens visant à prévenir les recours abusifs. L'un des plus anciens est la doctrine de la préclusion *per rem judicatem*, qui tire son origine du droit romain et selon laquelle, une fois le différend tranché définitivement, il ne peut être soumis à nouveau aux tribunaux : *Farwell c. La Reine* (1894), 22 R.C.S. 553, p. 558, et *Angle c. Ministre du Revenu national*, [1975] 2 R.C.S. 248, p. 267-268. La doctrine est opposable tant à l'égard de la cause d'action ainsi décidée (on parle de préclusion fondée sur la demande, sur la cause d'action ou sur l'action) que des divers éléments constitutifs ou faits substantiels s'y rapportant nécessairement (on parle alors généralement de préclusion découlant d'une question déjà tranchée) : G. S. Holmsted et G. D. Watson, *Ontario Civil Procedure* (feuilles mobiles), vol. 3 suppl., 21§17 et suiv. Un autre aspect de la politique établie par les tribunaux en vue d'assurer le caractère définitif des instances est la règle qui prohibe les contestations indirectes, c'est-à-dire la règle selon laquelle l'ordonnance rendue par un tribunal compétent ne doit pas être remise en cause dans des procédures subséquentes, sauf celles prévues par la loi dans le but exprès de contester l'ordonnance : *Wilson c. La Reine*, [1983] 2 R.C.S. 594; *R. c. Litchfield*, [1993] 4 R.C.S. 333; *R. c. Sarson*, [1996] 2 R.C.S. 223.

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These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-

Initialement, ces règles ont été établies dans le contexte de procédures judiciaires antérieures. Leur champ d'application a depuis été élargi, avec les adaptations nécessaires, aux décisions de nature judiciaire ou quasi judiciaire rendues par les juridictions administratives — fonctionnaires ou tribunaux. Dans ce contexte, l'objectif spécifique poursuivi consiste à assurer l'équilibre entre le respect

making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

The extension of the doctrine of issue estoppel in Canada to administrative agencies is traced back to cases in the mid-1800s by D. J. Lange in *The Doctrine of Res Judicata in Canada* (2000), at p. 94 *et seq.*, including *Robinson v. McQuaid* (1854), 1 P.E.I.R. 103 (S.C.), at pp. 104-5, and *Bell v. Miller* (1862), 9 Gr. 385 (U.C. Ch.), at p. 386. The modern cases at the appellate level include *Raison v. Fenwick* (1981), 120 D.L.R. (3d) 622 (B.C.C.A.); *Rasanen, supra*; *Wong v. Shell Canada Ltd.* (1995), 15 C.C.E.L. (2d) 182 (Alta. C.A.); *Machin v. Tomlinson* (2000), 194 D.L.R. (4th) 326 (Ont. C.A.); and *Hamelin v. Davis* (1996), 18 B.C.L.R. (3d) 112 (C.A.). See also *Thrasyvoulou v. Environment Secretary*, [1990] 2 A.C. 273 (H.L.). Modifications were necessary because of the “major differences that can exist between [administrative orders and court orders] in relation, *inter alia*, to their legal nature and the position within the state structure of the institutions that issue them”: *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, at para. 4. There is generally no dispute that court orders are judicial orders; the same cannot be said of the myriad of orders that are issued across the range of administrative tribunals.

In this appeal the parties have not argued “cause of action” estoppel, apparently taking the view that the statutory framework of the ESA claim sufficiently distinguishes it from the common law framework of the court case. I therefore say no more about it. They have however, joined issue on

de l'équité envers les parties et la protection du processus décisionnel administratif, dont l'intégrité serait compromise si on autorisait trop facilement les contestations indirectes ou l'engagement d'une nouvelle instance à l'égard de questions déjà tranchées.

Dans *The Doctrine of Res Judicata in Canada* (2000), p. 94 *et suiv.*, D. J. Lange attribue l'application aux organismes administratifs canadiens de la doctrine de la préclusion découlant d'une question déjà tranchée à certaines décisions datant du milieu du XIX^e siècle — notamment les affaires *Robinson c. McQuaid* (1854), 1 P.E.I.R. 103 (C.S.), p. 104-105, et *Bell c. Miller* (1862), 9 Gr. 385 (Ch. H.-C.), p. 386. Parmi les arrêts contemporains rendus par des cours d'appel, mentionnons les suivants : *Raison c. Fenwick* (1981), 120 D.L.R. (3d) 622 (C.A.C.-B.); *Rasanen*, précité; *Wong c. Shell Canada Ltd.* (1995), 15 C.C.E.L. (2d) 182 (C.A. Alb.); *Machin c. Tomlinson* (2000), 194 D.L.R. (4th) 326 (C.A. Ont.); et *Hamelin c. Davis* (1996), 18 B.C.L.R. (3d) 112 (C.A.). Voir également *Thrasyvoulou c. Environment Secretary*, [1990] 2 A.C. 273 (H.L.). Des modifications s'imposaient en raison des « différences importantes qui peuvent exister entre ces deux types d'ordonnances [c.-à-d. les ordonnances administratives et les ordonnances judiciaires], notamment quant à leur nature juridique et la place des institutions qui les rendent à l'intérieur de la structure étatique » : *R. c. Consolidated Maybrun Mines Ltd.*, [1998] 1 R.C.S. 706, par. 4. On s'entend généralement pour dire que les ordonnances des cours de justice sont des ordonnances de nature judiciaire; il n'en est pas de même pour les innombrables ordonnances rendues par les différents tribunaux administratifs.

Dans le présent pourvoi, les parties n'ont pas plaidé la préclusion fondée sur la « cause d'action », estimant apparemment que le cadre législatif de la demande fondée sur la LNE distingue suffisamment cette demande du cadre juridique de common law de l'instance judiciaire. Je n'en dirai par conséquent pas davantage à ce sujet. Les parties ont cependant lié contestation quant à l'application de la préclusion découlant d'une question

the application of issue estoppel and the relevance of the rule against collateral attack.

déjà tranchée et à la pertinence de la règle prohibant les contestations indirectes.

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Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420, at p. 422:

La préclusion découlant d'une question déjà tranchée a été définie de façon précise par le juge Middleton de la Cour d'appel de l'Ontario dans l'arrêt *McIntosh c. Parent*, [1924] 4 D.L.R. 420, p. 422 :

When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added.]

[TRADUCTION] Lorsqu'une question est soumise à un tribunal, le jugement de la cour devient une décision définitive entre les parties et leurs ayants droit. Les droits, questions ou faits distinctement mis en cause et directement réglés par un tribunal compétent comme motifs de recouvrement ou comme réponses à une prétention qu'on met de l'avant, ne peuvent être jugés de nouveau dans une poursuite subséquente entre les mêmes parties ou leurs ayants droit, même si la cause d'action est différente. Le droit, la question ou le fait, une fois qu'on a statué à son égard, doit être considéré entre les parties comme établi de façon concluante aussi longtemps que le jugement demeure. [Je souligne.]

This statement was adopted by Laskin J. (later C.J.), dissenting in *Angle, supra*, at pp. 267-68. This description of the issues subject to estoppel (“[a]ny right, question or fact distinctly put in issue and directly determined”) is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., “all matters which were, or might properly have been, brought into litigation”, *Farwell, supra*, at p. 558). Dickson J. (later C.J.), speaking for the majority in *Angle, supra*, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. “It will not suffice” he said, “if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment.” The question out of which the estoppel is said to arise must have been “fundamental to the decision arrived at” in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law (“the questions”) that

Le juge Laskin (plus tard Juge en chef) a souscrit à cet énoncé dans ses motifs de dissidence dans l'arrêt *Angle*, précité, p. 267-268. Cette description des aspects visés par la préclusion (« [l]es droits, questions ou faits distinctement mis en cause et directement réglés ») est plus exigeante que celle utilisée dans certaines décisions plus anciennes à l'égard de la préclusion fondée sur la cause d'action (par exemple [TRADUCTION] « toute question ayant été débattue ou qui aurait pu à bon droit l'être », *Farwell*, précité, p. 558). S'exprimant au nom de la majorité dans l'arrêt *Angle*, précité, p. 255, le juge Dickson (plus tard Juge en chef) a également fait sienne la définition plus exigeante de l'objet de la préclusion découlant d'une question déjà tranchée. « Il ne suffira pas », a-t-il dit, « que la question ait été soulevée de façon annexe ou incidente dans l'affaire antérieure ou qu'elle doive être inférée du jugement par raisonnement. » La question qui est censée donner naissance à la préclusion doit avoir été « fondamentale à la décision à laquelle on est arrivé » dans l'affaire antérieure. En d'autres termes, comme il est expliqué plus loin, la préclusion vise les faits substantiels, les conclusions de droit ou les conclusions mixtes de fait et de droit (« les questions ») à l'égard desquels on a nécessairement statué (même si on ne

were necessarily (even if not explicitly) determined in the earlier proceedings.

The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle*, *supra*, at p. 254:

- (1) that the same question has been decided;
- (2) that the judicial decision which is said to create the estoppel was final; and,
- (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

The appellant's argument is that even though the ESA officer was required to make a decision in a judicial manner, she failed to do so. Although she had jurisdiction under the ESA to deal with the claim, the ESA officer lost jurisdiction when she failed to disclose to the appellant the case the appellant had to meet and to give the appellant the opportunity to be heard in answer to the case put against her. The ESA officer therefore never made a "judicial decision" as required. The appellant also says that her own failure to exercise her right to seek internal administrative review of the decision should not be given the conclusive effect adopted by the Ontario Court of Appeal. Even if the conditions precedent to issue estoppel were present, she says, the court had a discretion to relieve against the harsh effects of estoppel *per rem judicatem* in the circumstances of this case, and erred in failing to do so.

A. The Statutory Scheme

1. The Employment Standards Officer

The ESA applies to "every contract of employment, oral or written, express or implied" in Ontario (s. 2(2)) subject to certain exceptions under the regulations, and establishes a number of minimum

l'a pas fait de façon explicite) dans le cadre de l'instance antérieure.

Les conditions d'application de la préclusion découlant d'une question déjà tranchée ont été énoncées par le juge Dickson dans l'arrêt *Angle*, précité, p. 254 :

- (1) que la même question ait été décidée;
- (2) que la décision judiciaire invoquée comme créant la [préclusion] soit finale; et
- (3) que les parties dans la décision judiciaire invoquée, ou leurs ayants droit, soient les mêmes que les parties engagées dans l'affaire où la [préclusion] est soulevée, ou leurs ayants droit.

L'appelante soutient que l'agente des normes d'emploi n'a pas — bien quelle ait été tenue de le faire — pris sa décision de manière judiciaire. L'agente disposait, en vertu de la LNE, de la compétence nécessaire pour connaître de la réclamation, mais elle a perdu cette compétence en omettant de communiquer à l'appelante les prétentions de l'employeur et de lui donner la possibilité de les réfuter. L'agente n'a donc jamais rendu une « décision judiciaire » comme elle était tenue de le faire. L'appelante soutient en outre que sa propre omission d'exercer son droit de demander la révision administrative interne de la décision de l'agente ne devrait pas se voir accorder l'effet déterminant que lui a attribué la Cour d'appel de l'Ontario. Selon elle, même si les conditions d'application de la préclusion découlant d'une question déjà tranchée étaient réunies, la cour avait, dans les circonstances de l'espèce, le pouvoir discrétionnaire de la soustraire aux effets draconiens de la préclusion *per rem judicatem*, et elle a commis une erreur en s'abstenant de le faire.

A. Le cadre législatif

1. L'agent des normes d'emploi

La LNE s'applique à « tout contrat de travail, verbal ou écrit, exprès ou implicite » en Ontario (par. 2(2)), sous réserve de certaines exceptions prévues par règlement, et elle établit un certain

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employment standards for the protection of employees. These include hours of work, minimum wages, overtime pay, benefit plans, public holidays and vacation with pay. More specifically, the Act provides a summary procedure under which aggrieved employees can seek redress with respect to an employer's alleged failure to comply with these standards. The objective is to make redress available, where it is appropriate at all, expeditiously and cheaply. In the first instance, the dispute is referred to an employment standards officer. ESA officers are public servants in the Ministry of Labour. They are generally not legally trained, but have some experience in labour relations. The statute does not set out any particular procedure that must be followed in disposing of claims. ESA officers are given wide powers to enter premises, inspect and remove documents and make other relevant inquiries. If liability is found, ESA officers have broad powers of enforcement (s. 65).

nombre de normes d'emploi minimales en vue de protéger les employés. Ces normes portent notamment sur les heures de travail, le salaire minimum, le salaire pour les heures supplémentaires, les régimes d'avantages sociaux, les jours fériés et les congés payés. Plus particulièrement, la Loi établit une procédure sommaire permettant aux employés qui s'estiment lésés parce que leur employeur aurait omis de se conformer à ces normes de demander réparation à cet égard. L'objectif est d'offrir, dans les cas appropriés, un recours rapide et peu coûteux. Au premier palier, l'examen du différend est confié à un agent des normes d'emploi. Fonctionnaires du ministère du Travail, ces personnes n'ont généralement pas de formation juridique, mais elles possèdent une certaine expérience en matière de relations de travail. La Loi ne prescrit pas la procédure à suivre pour statuer sur les demandes. L'agent des normes d'emploi dispose de pouvoirs étendus qui l'autorisent notamment à pénétrer dans des locaux, à effectuer des inspections, à emporter des documents avec lui et à interroger toute personne à l'égard de questions pertinentes. S'il constate l'inobservation de la loi, l'agent dispose de larges pouvoirs afin de la faire respecter (art. 65).

28 On receipt of an employee demand, generally speaking, the ESA officer contacts the employer to ascertain whether in fact wages are unpaid and if so for what reason. Although in this case there was a one-hour meeting between the ESA officer and the appellant, there is no requirement for such a face-to-face meeting, and clearly there is no contemplation of any sort of oral hearing in which both parties are present. It is a rough-and-ready procedure that is wholly inappropriate, one might think, to the definitive resolution of a contractual claim of some legal and factual complexity.

En règle générale, sur réception de la demande d'un employé, l'agent des normes d'emploi communique avec l'employeur pour vérifier si le salaire est effectivement impayé et, dans l'affirmative, pour connaître la raison du non-paiement. Bien que, dans la présente affaire, l'agent des normes d'emploi se soit entretenue avec l'appelante pendant une heure, rien n'exige la tenue d'une telle rencontre et, manifestement, aucune audience à laquelle participeraient les deux parties n'est envisagée. D'aucuns estimerait qu'il s'agit d'une procédure expéditive tout à fait inappropriée pour trancher de façon définitive des prétentions contractuelles présentant une certaine complexité sur les plans juridique et factuel.

29 There are many advantages to the employee in such a forum. The services of the ESA officer are supplied free of charge. Legal representation is unnecessary. The process moves more rapidly than could realistically be expected in the courts. There

Ce mécanisme présente de nombreux avantages pour les employés. Les services de l'agent des normes d'emploi sont gratuits. La représentation par avocat n'est pas nécessaire. L'instance se déroule plus rapidement que ce à quoi on pourrait

are corresponding disadvantages. The ESA officer is likely not to have legal training and has neither the time nor the resources to deal with a contract claim in a manner comparable to the courtroom setting. At the time of these proceedings a double standard was applied to an appeal (or, as it is called, a “review”). The employer was entitled as of right to a review (s. 68) but, as discussed below, the employee could ask for one but the request could be refused by the Director (s. 67(3)). At the time, as well, there was no monetary limit on the ESA officer’s jurisdiction. The Act has since been amended to provide an upper limit on claims of \$10,000 (S.O. 1996, c. 23, s. 19(1)). Had the ESA officer’s determination gone the other way, the employer could have been saddled with a \$300,000 liability arising out of a deeply flawed decision unless reversed on an administrative review or quashed by a supervising court.

2. The Review Process

The employee, as stated, has no appeal as of right. Section 67(2) of the Act provides that an employee dissatisfied with the decision at first instance may apply to the Director for an administrative review in writing within 15 days of the date of the mailing of the employment standards officer’s decision. Under s. 67(3), “the Director may appoint an adjudicator who shall hold a hearing” (emphasis added). The word “may” grants the Director a discretion to hold or not to hold a hearing. The Ontario Court of Appeal noted this point, but said the parties had attached little importance to it.

It seems clear the legislature did not intend to confer an appeal as of right. Where the Director

vraisemblablement s’attendre devant les tribunaux judiciaires. À ces avantages correspondent toutefois des désavantages. Il est probable que l’agent n’a pas de formation juridique et qu’il n’a ni le temps ni les ressources nécessaires pour examiner une demande de nature contractuelle comme cela se passerait dans la salle d’audience d’une cour de justice. Au moment où ces procédures se sont déroulées, des règles inégales s’appliquaient en matière d’appel (ou de « révision » selon les termes de la Loi). En effet, l’employeur pouvait demander de plein droit la révision de la décision (art. 68). Toutefois, comme nous le verrons plus loin, l’employé pouvait lui aussi présenter une demande de révision, mais le directeur pouvait refuser d’y donner suite (par. 67(3)). De même, au cours de la période pertinente le montant des demandes à l’égard desquelles l’agent des normes d’emploi avait compétence n’était pas plafonné. La Loi a depuis été modifiée et seules les réclamations d’au plus 10 000 \$ sont maintenant visées (L.O. 1996, ch. 23, par. 19(1)). Si, en l’espèce, l’agente avait statué en faveur de l’employée, l’employeur aurait pu devoir supporter une obligation de 300 000 \$ découlant d’une décision présentant de profondes lacunes, à moins d’avoir gain de cause à la suite d’une révision administrative ou d’un contrôle judiciaire.

2. La procédure de révision

Comme nous l’avons indiqué, les employés ne peuvent pas interjeter appel de plein droit. En vertu du par. 67(2) de la Loi, l’employé insatisfait de la décision rendue au premier palier peut, dans les 15 jours qui suivent la mise à la poste de la décision, demander par écrit au directeur de réviser cette décision. Aux termes du par. 67(3), « le directeur peut nommer un arbitre de griefs pour tenir une audience » (je souligne). L’emploi du mot « peut » confère au directeur le pouvoir discrétionnaire de décider s’il y aura ou non une audience. La Cour d’appel de l’Ontario a souligné ce point, mais a affirmé que les parties y avaient attaché peu d’importance.

Il paraît clair que le législateur n’a pas voulu créer un appel de plein droit. Lorsque le directeur

does appoint an adjudicator a hearing is mandated by the Act. Further delay and expense to the Ministry and the parties would follow as a matter of course. The juxtaposition in s. 67(3) of “may” and “shall” (and in the French text, the instruction that the Director “*peut nommer un arbitre de griefs pour tenir une audience*” (emphasis added)) puts the matter beyond doubt. The Ontario legislature intended the Director to have a discretion to decline to refer a matter to an adjudicator which, in his or her opinion, is simply not justified. Even the adjudicators hearing a review under s. 67(3) of the Act are not by statute required to be legally trained. It was likely considered undesirable by the Ontario legislature to give each and every dissatisfied employee a review as of right, particularly where the amounts in issue are often relatively modest. The discretion must be exercised according to proper principles, of course, but a discretion it remains.

nomme un arbitre de griefs, la Loi exige la tenue d’une audience. Il en résulte évidemment des délais et des dépenses supplémentaires pour le ministère et les parties. La juxtaposition des auxiliaires « *may* » et « *shall* » dans la version anglaise du par. 67(3) (et, dans la version française, l’indication que le directeur « *peut nommer un arbitre de griefs pour tenir une audience* » (je souligne)) écarte tout doute à cet égard. Le législateur ontarien entendait que le directeur dispose du pouvoir discrétionnaire de refuser de saisir un arbitre de griefs d’une demande qui, à son avis, n’est tout simplement pas justifiée. Même les arbitres chargés de la révision prévue au par. 67(3) de la LNE ne sont pas tenus par la loi de posséder une formation juridique. Le législateur ontarien a probablement jugé qu’il n’était pas souhaitable que tout employé insatisfait d’une décision puisse obtenir de plein droit la révision de celle-ci, compte tenu particulièrement du fait que la somme en jeu est souvent relativement modeste. Il va de soi que ce pouvoir discrétionnaire doit être exercé en conformité avec les principes pertinents, mais il n’en demeure pas moins un pouvoir discrétionnaire.

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If an internal review were ordered, an adjudicator would then have looked at the appellant’s claim *de novo* and would undoubtedly have shared the employer documents with the appellant and given her every opportunity to respond and comment. I agree that under the scheme of the Act procedural defects at the ESA officer level, including a failure to provide proper notice and an opportunity to be heard in response to the opposing case, can be rectified on review. The respondent says the appellant, having elected to proceed under the Act, was required to seek an internal review if she was dissatisfied with the initial outcome. Not having done so, she is estopped from pursuing her \$300,000 claim. The appellant says that the ESA procedure was so deeply flawed that she was entitled to walk away from it.

Si une révision interne avait été ordonnée, un arbitre aurait alors examiné *de novo* la demande de l’appelante et aurait sans aucun doute permis à cette dernière de prendre connaissance des documents de l’employeur et lui aurait donné la possibilité d’y répondre et de les commenter. Je reconnais que, sous le régime de la Loi, les vices procéduraux qui surviennent à l’étape de la décision initiale, y compris l’omission de donner aux intéressés un préavis suffisant et la possibilité de se faire entendre pour réfuter la thèse de la partie adverse, peuvent être corrigés à l’étape de la révision. L’intimée soutient que, du fait que l’appelante a choisi de se prévaloir de la Loi, elle devait recourir au mécanisme de révision prévue pour celle-ci si elle était insatisfaite de la décision rendue au premier palier. Comme elle ne l’a pas fait, elle est précluse de continuer de réclamer la somme de 300 000 \$. L’appelante réplique que la procédure prévue par la LNE souffrait de lacunes si profondes qu’il lui était loisible de renoncer à y recourir.

B. *The Applicability of Issue Estoppel*1. Issue Estoppel: A Two-Step Analysis

The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle, supra*. If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied: *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), at para. 32; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at paras. 38-39; *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173 (C.A.), at para. 56.

The appellant was quite entitled, in the first instance, to invoke the jurisdiction of the Ontario superior court to deal with her various monetary claims. The respondent was not entitled as of right to the imposition of an estoppel. It was up to the court to decide whether, in the exercise of its discretion, it would decline to hear aspects of the claims that were previously the subject of ESA administrative proceedings.

2. The Judicial Nature of the Decision

A common element of the preconditions to issue estoppel set out by Dickson J. in *Angle, supra*, is the fundamental requirement that the decision in the prior proceeding be a judicial decision. According to the authorities (see e.g., G. Spencer Bower, A. K. Turner and K. R. Handley, *The Doc-*

B. *L'applicabilité de la préclusion découlant d'une question déjà tranchée*1. Préclusion découlant d'une question déjà tranchée : analyse à deux volets

Les règles régissant la préclusion découlant d'une question déjà tranchée ne doivent pas être appliquées machinalement. L'objectif fondamental est d'établir l'équilibre entre l'intérêt public qui consiste à assurer le caractère définitif des litiges et l'autre intérêt public qui est d'assurer que, dans une affaire donnée, justice soit rendue. (Il existe des intérêts privés correspondants.) Il s'agit, au cours de la première étape, de déterminer si le requérant (en l'occurrence l'intimée) a établi l'existence des conditions d'application de la préclusion découlant d'une question déjà tranchée énoncées par le juge Dickson dans l'arrêt *Angle*, précité. Dans l'affirmative, la cour doit ensuite se demander, dans l'exercice de son pouvoir discrétionnaire, si cette forme de préclusion *devrait* être appliquée : *British Columbia (Minister of Forests) c. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), par. 32; *Schweneke c. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), par. 38-39; *Braithwaite c. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173 (C.A.), par. 56.

L'appelante avait parfaitement le droit, en première instance, de saisir la Cour supérieure de l'Ontario de ses diverses réclamations financières. L'intimée ne pouvait se voir accorder de plein droit l'application de la préclusion. Il appartenait à la cour de décider, dans l'exercice de son pouvoir discrétionnaire, s'il convenait qu'elle refuse de connaître ou non de certains aspects de la demande ayant déjà fait l'objet de la procédure administrative engagée sous le régime de la LNE.

2. La nature judiciaire de la décision

L'exigence fondamentale selon laquelle la décision antérieure doit être une décision judiciaire est un élément qui est commun aux conditions préalables à l'application de la préclusion découlant d'une question déjà tranchée énoncées par le juge Dickson dans l'arrêt *Angle*, précité. Selon la doc-

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trine of Res Judicata (3rd ed. 1996), at paras. 18-20), there are three elements that may be taken into account. First is to examine the nature of the administrative authority issuing the decision. Is it an institution that is capable of receiving and exercising adjudicative authority? Secondly, as a matter of law, is the particular decision one that was required to be made in a judicial manner? Thirdly, as a mixed question of law and fact, was the decision made in a judicial manner? These are distinct requirements:

It is of no avail to prove that the alleged *res judicata* was a decision, or that it was pronounced according to judicial principles, unless it emanated from such a tribunal in the exercise of its adjudicative functions; nor is it sufficient that it was pronounced by such a tribunal unless it was a judicial decision on the merits. It is important, therefore, at the outset to have a proper understanding of what constitutes a judicial tribunal and a judicial decision for present purposes.

(Spencer Bower, Turner and Handley, *supra*, para. 20)

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As to the third aspect, whether or not the particular decision in question was actually made in accordance with judicial requirements, I note the recent *ex curia* statement of Handley J. (the current editor of *The Doctrine of Res Judicata*) that:

The prior decision judicial, arbitral, or administrative, must have been made within jurisdiction before it can give rise to *res judicata* estoppels.

(“Res Judicata: General Principles and Recent Developments” (1999), 18 *Aust. Bar Rev.* 214, at p. 215)

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The main controversy in this case is directed to this third aspect, i.e., is a decision taken without regard to requirements of notice and an opportunity to be heard *capable* of supporting an issue

trine (voir, par exemple, G. Spencer Bower, A. K. Turner et K. R. Handley, *The Doctrine of Res Judicata* (3^e éd. 1996), par. 18-20), trois éléments peuvent être pris en considération. Premièrement, il faut se pencher sur la nature du décideur administratif ayant rendu la décision. S’agit-il d’un organe pouvant être investi d’un pouvoir juridictionnel et capable d’exercer ce pouvoir? Deuxièmement, sur le plan juridique, la décision litigieuse devait-elle être prise judiciairement? Troisièmement — question mixte de fait et de droit — la décision *a-t-elle* été rendue de manière judiciaire? Il s’agit d’exigences distinctes :

[TRADUCTION] Il ne sert à rien de prouver que la prétendue chose jugée était une décision ou qu’elle a été prononcée conformément aux principes applicables aux tribunaux judiciaires à moins qu’elle ait été rendue par un tel tribunal dans l’exercice de son pouvoir juridictionnel; il ne suffit pas non plus qu’elle ait été prononcée par un tel tribunal, sauf s’il s’agit d’une décision judiciaire sur le fond. Par conséquent, il importe de bien saisir dès le départ ce qu’est un tribunal judiciaire et ce qu’est une décision judiciaire pour les fins qui nous occupent.

(Spencer Bower, Turner et Handley, *op. cit.*, par. 20)

En ce qui concerne le troisième élément, soit la question de savoir si la décision en cause a effectivement été rendue conformément aux exigences applicables aux décisions judiciaires, je souligne l’affirmation suivante, faite récemment par le juge Handley (éditeur actuel de l’ouvrage *The Doctrine of Res Judicata*) en dehors du cadre de ses fonctions de juge :

[TRADUCTION] La décision antérieure — qu’elle soit judiciaire, arbitrale ou administrative — doit avoir été rendue dans les limites de la compétence du décideur pour que puisse être plaidée la préclusion découlant d’une question déjà tranchée.

(« Res Judicata : General Principles and Recent Developments » (1999), 18 *Aust. Bar Rev.* 214, p. 215)

En l’espèce, le désaccord porte principalement sur ce troisième élément : une décision prise sans avoir respecté les exigences en matière de préavis et sans avoir donné à l’intéressé la possibilité de se

estoppel? In my opinion, the answer to this question is yes.

(a) *The Institutional Framework*

The decision relied on by Rosenberg J.A. in this respect relates to the generic role and function of the ESA officer: *Re Downing and Graydon, supra*, per Blair J.A., at p. 305:

In the present case, the employment standards officers have the power to adjudicate as well as to investigate. Their investigation is made for the purpose of providing them with information on which to base the decision they must make. The duties of the employment standards officers embrace all the important *indicia* of the exercise of a judicial power including the ascertainment of facts, the application of the law to those facts and the making of a decision which is binding upon the parties.

The parties did not dispute that ESA officials could properly be given adjudicative responsibilities to be discharged in a judicial manner. An earlier legislative limit of \$4,000 on unpaid wages (excluding severance pay and benefits payable under pregnancy and parental provisions) was eliminated in 1991 by S.O. 1991, c. 16, s. 9(1), but subsequent to the ESA decision in the present case a new limit of \$10,000 was imposed. This is the same limit as is imposed on the Small Claims Court by the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 23(1), and O. Reg. 626/00, s. 1(1).

(b) *The Nature of ESA Decisions Under Section 65(1)*

An administrative tribunal may have judicial as well as administrative or ministerial functions. So may an administrative officer.

One distinction between administrative and judicial decisions lies in differentiating adjudica-

faire entendre est-elle *capable* de fonder l'application de la préclusion découlant d'une question déjà tranchée? À mon avis, la réponse à cette question est oui.

a) *Le cadre institutionnel*

La décision sur laquelle s'est appuyé le juge Rosenberg de la Cour d'appel de l'Ontario à cet égard a trait à la fonction et au rôle génériques de l'agent des normes d'emploi : *Re Downing and Graydon*, précité, le juge Blair, p. 305 :

[TRADUCTION] En l'espèce, l'agent des normes d'emploi a le pouvoir de décider ainsi que celui d'enquêter. Il fait enquête afin de recueillir les renseignements qui fonderont la décision qu'il doit rendre. Ses fonctions comportent tous les indices importants de l'exercice d'un pouvoir judiciaire, notamment la détermination des faits, l'application du droit à ces faits et la prise d'une décision liant les parties.

Les parties ne contestent pas le fait que les fonctionnaires chargés de l'application de la LNE pouvaient à bon droit être investis de fonctions judiciaires devant être exercées de manière judiciaire. Le plafond de 4 000 \$ que prévoyait la Loi à l'égard des réclamations pour salaire impayé (à l'exclusion de l'indemnité de cessation d'emploi et des prestations payables au titre des dispositions relatives au congé de maternité et au congé parental) a été aboli en 1991 par L.O. 1991, ch. 16, par. 9(1), mais après la décision rendue en application de la LNE dans la présente affaire, un nouveau plafond de 10 000 \$ a été fixé. Il s'agit du même plafond auquel est assujettie la Cour des petites créances par la *Loi sur les tribunaux judiciaires*, L.R.O. 1990, ch. C.43, par. 23(1), et le Règl. de l'Ont. 626/00, par. 1(1).

b) *La nature des décisions rendues en application du par. 65(1)*

Un tribunal administratif peut exercer des fonctions judiciaires ainsi que des fonctions administratives ou ministérielles. Il en est de même d'un fonctionnaire.

Une des caractéristiques qui distinguent les décisions administratives des décisions judiciaires est

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tive from investigative functions. In the latter mode the ESA officer is taking the initiative to gather information. The ESA officer acts as a self-starting investigator who is not confined within the limits of the adversarial process. The distinction between investigative and adjudicative powers is discussed in *Guay v. Lafleur*, [1965] S.C.R. 12, at pp. 17-18. The inapplicability of issue estoppel to investigations is noted by Diplock L.J. in *Thoday v. Thoday*, [1964] P. 181 (Eng. C.A.), at p. 197.

la différence qui existe entre des fonctions juridictionnelles et des fonctions d'enquête. Dans l'exercice des secondes, l'agent des normes d'emploi prend l'initiative de recueillir des éléments d'information. Il agit en tant qu'enquêteur autonome et n'est pas assujéti aux contraintes de la procédure contradictoire. La distinction entre les pouvoirs d'enquête et les pouvoirs juridictionnels a été examinée dans l'arrêt *Guay c. Lafleur*, [1965] R.C.S. 12, p. 17-18. L'inapplicabilité de la préclusion découlant d'une question déjà tranchée aux enquêtes administratives a été mentionnée par le lord juge Diplock dans *Thoday c. Thoday*, [1964] P. 181 (C.A. Angl.), p. 197.

41 Although ESA officers may have non-adjudicative functions, they must exercise their adjudicative functions in a judicial manner. While they utilize procedures more flexible than those that apply in the courts, their decisions must be based on findings of fact and the application of an objective legal standard to those facts. This is characteristic of a judicial function: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (1998), vol. 2, § 7:1310, p. 7-7.

Quoique les agents des normes d'emploi puissent avoir des fonctions non juridictionnelles, lorsqu'ils accomplissent des fonctions juridictionnelles ils sont tenus de le faire de manière judiciaire. Bien qu'ils aient recours à des procédures plus souples que celles des cours de justice, leurs décisions doivent s'appuyer sur des conclusions de fait et sur l'application à ces faits d'une norme juridique objective. Il s'agit là d'une caractéristique de fonctions judiciaires : D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (1998), vol. 2, par. 7:1310, p. 7-7.

42 The adjudication of the claim, once the relevant information had been gathered, is of a judicial nature.

La décision qui statue sur une plainte après l'obtention de l'information pertinente est une décision de nature judiciaire.

(c) *Particulars of the Decision in Question*

c) *Le détail de la décision en cause*

43 The Ontario Court of Appeal concluded that the decision of the ESA officer in this case was in fact reached contrary to the principles of natural justice. The appellant had neither notice of the employer's case nor an opportunity to respond.

La Cour d'appel de l'Ontario a conclu que la décision de l'agent des normes d'emploi avait de fait été rendue au mépris des principes de justice naturelle. L'appelante n'a pas été informée des prétentions de l'employeur et n'a pas eu la possibilité de les réfuter.

44 The appellant contends that it is not enough to say the decision *ought* to have been reached in a judicial manner. The question is: Was it decided in a judicial manner in this case? There is some support for this view in *Rasanen*, *supra*, per Abella J.A., at p. 280:

L'appelante soutient qu'il ne suffit pas de dire que la décision *aurait dû* être prise de manière judiciaire, mais qu'il faut plutôt se demander : La décision a-t-elle été prise de manière judiciaire en l'espèce? Cet argument trouve un certain appui dans l'arrêt *Rasanen*, précité, où madame le juge Abella de la Cour d'appel de l'Ontario a dit ceci, à la p. 280 :

As long as the hearing process in the tribunal provides parties with an opportunity to know and meet the case against them, and so long as the decision is within the tribunal's jurisdiction, then regardless of how closely the process mirrors a trial or its procedural antecedents, I can see no principled basis for exempting issues adjudicated by tribunals from the operation of issue estoppel in a subsequent action. [Emphasis added.]

Trial level decisions in Ontario subsequently adopted this approach: *Machado v. Pratt & Whitney Canada Inc.* (1995), 12 C.C.E.L. (2d) 132 (Ont. Ct. (Gen. Div.)); *Randhawa v. Everest & Jennings Canadian Ltd.* (1996), 22 C.C.E.L. (2d) 19 (Ont. Ct. (Gen. Div.)); *Heynen v. Frito-Lay Canada Ltd.* (1997), 32 C.C.E.L. (2d) 183 (Ont. Ct. (Gen. Div.)); *Perez v. GE Capital Technology Management Services Canada Inc.* (1999), 47 C.C.E.L. (2d) 145 (Ont. S.C.J.). The statement of Métivier J. in *Munyal v. Sears Canada Inc.* (1997), 29 C.C.E.L. (2d) 58 (Ont. Ct. (Gen. Div.)), at p. 60, reflects that position:

The plaintiff relies on [*Rasanen*] and other similar decisions to assert that the principle of issue estoppel should apply to administrative decisions. This is true only where the decision is the result of a fair, unbiased adjudicative process where "the hearing process provides parties with an opportunity to know and meet the case against them".

In *Wong*, *supra*, the Alberta Court of Appeal rejected an attack on the decision of an employment standards review officer and held that the ESA decision was adequate to create an estoppel as long as "the appellant knew of the case against him and was given an opportunity to state his position" (para. 20). See also *Alderman v. North Shore Studio Management Ltd.*, [1997] 5 W.W.R. 535 (B.C.S.C.).

[TRADUCTION] Pour autant que la procédure d'instruction du tribunal administratif donne à chacune des parties la possibilité de connaître les prétentions de l'autre et de les réfuter et que la décision rendue relève de la compétence du tribunal, peu importe alors à quel point la procédure s'apparente à un procès ou aux procédures préalables à celui-ci, je ne vois aucune raison fondée sur des principes qui justifierait, dans le cadre d'une action subséquente, de soustraire les questions décidées par un tribunal administratif à l'application de la préclusion découlant d'une question déjà tranchée. [Je souligne.]

Cette approche a subséquemment été retenue par des tribunaux de première instance en Ontario : *Machado c. Pratt & Whitney Canada Inc.* (1995), 12 C.C.E.L. (2d) 132 (C. Ont. (Div. gén.)); *Randhawa c. Everest & Jennings Canadian Ltd.* (1996), 22 C.C.E.L. (2d) 19 (C. Ont. (Div. gén.)); *Heynen c. Frito-Lay Canada Ltd.* (1997), 32 C.C.E.L. (2d) 183 (C. Ont. (Div. gén.)); *Perez c. GE Capital Technology Management Services Canada Inc.* (1999), 47 C.C.E.L. (2d) 145 (C.S.J.). Les propos suivants du juge Métivier dans l'affaire *Munyal c. Sears Canada Inc.* (1997), 29 C.C.E.L. (2d) 58 (C. Ont. (Div. gén.)), p. 60, reflètent ce point de vue :

[TRADUCTION] La partie demanderesse s'appuie sur [l'arrêt *Rasanen*] et sur d'autres décisions au même effet pour affirmer que le principe de la préclusion découlant d'une question déjà tranchée devrait s'appliquer aux décisions administratives. Ce n'est le cas que lorsque la décision est le fruit d'un processus décisionnel équitable et impartial « comportant une audience dans le cadre de laquelle chacune des parties a la possibilité de prendre connaissance des prétentions de l'autre et de les réfuter ».

Dans l'arrêt *Wong*, précité, la Cour d'appel de l'Alberta a rejeté une contestation visant la décision d'un agent de révision en matière de normes d'emploi et a conclu qu'il était possible de plaider la préclusion à l'égard de cette décision dans la mesure où [TRADUCTION] « l'appelant connaissait les prétentions formulées contre lui et avait eu la possibilité de faire valoir son point de vue » (par. 20). Voir également *Alderman c. North Shore Studio Management Ltd.*, [1997] 5 W.W.R. 535 (C.S.C.-B.).

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In my view, with respect, the theory that a denial of natural justice deprives the ESA decision of its character as a “judicial” decision rests on a misconception. Flawed the decision may be, but “judicial” (as distinguished from administrative or legislative) it remains. Once it is determined that the decision maker was capable of receiving and exercising adjudicative authority and that the particular decision was one that was required to be made in a judicial manner, the decision does not cease to have that character (“judicial”) because the decision maker erred in carrying out his or her functions. As early as *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128 (H.L.), it was held that a conviction entered by an Alberta magistrate could not be quashed for lack of jurisdiction on the grounds that the depositions showed that there was no evidence to support the conviction or that the magistrate misdirected himself in considering the evidence. The jurisdiction to try the charges was distinguished from alleged errors in “the observance of the law in the course of its exercise” (p. 156). If the conditions precedent to the exercise of a judicial jurisdiction are satisfied (as here), subsequent errors in its exercise, including violations of natural justice, render the decision voidable, not void: *Harekin v. University of Regina*, [1979] 2 S.C.R. 561, at pp. 584-85. The decision remains a “judicial decision”, although seriously flawed by the want of proper notice and the denial of the opportunity to be heard.

En toute déférence, j’estime que la thèse voulant que l’inobservation des principes de justice naturelle ait pour effet d’enlever tout caractère « judiciaire » à la décision fondée sur la LNE repose sur une idée fausse. Il se peut que la décision présente des failles, mais elle demeure « judiciaire » (plutôt qu’administrative ou législative). Une fois qu’il est établi que l’auteur de la décision pouvait être investi d’un pouvoir juridictionnel, qu’il pouvait exercer ce pouvoir et que la décision litigieuse devait être rendue de manière judiciaire, celle-ci ne perd pas son caractère « judiciaire » parce que son auteur a commis une erreur dans l’accomplissement de ses fonctions. Dans un vieil arrêt, *R. c. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128 (H.L.), il a été jugé que la déclaration de culpabilité inscrite par un magistrat albertain ne pouvait être annulée pour cause d’absence de compétence sur le fondement que les témoignages ne révélaient aucune preuve étayant la déclaration de culpabilité ou parce que le magistrat s’était donné des directives erronées dans l’examen de la preuve. Une distinction a été établie entre le pouvoir de juger les accusations et les erreurs qui auraient été commises en matière d’[TRADUCTION] « observation de la loi dans l’exercice de ce pouvoir » (p. 156). Si les conditions préalables à l’exercice d’une compétence de nature judiciaire sont réunies (comme c’est le cas en l’espèce), toute erreur subséquente dans l’exercice de cette compétence, y compris les manquements aux règles de la justice naturelle, ne rend pas la décision nulle mais annulable : *Harekin c. Université de Regina*, [1979] 2 R.C.S. 561, p. 584-585. La décision reste une décision « judiciaire », quoiqu’elle souffre de sérieuses lacunes du fait de l’absence de préavis suffisant et du défaut d’accorder la possibilité de se faire entendre.

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I mentioned at the outset that estoppel *per rem judicatem* is closely linked to the rule against collateral attack, and indeed to the principles of judicial review. If the appellant had gone to court to seek judicial review of the ESA officer’s decision without first following the internal administrative review route, she would have been confronted with the decision of this Court in *Harekin*, *supra*. In that case a university student failed in his judicial review application to quash the decision of a

Comme je l’ai mentionné plus tôt, la préclusion *per rem judicatem* est étroitement liée à la règle prohibant les contestations indirectes et, de fait, aux principes régissant le contrôle judiciaire. Si l’appelante s’était adressée à une cour de justice pour demander le contrôle judiciaire de la décision de l’agent des normes d’emploi sans se prévaloir au préalable du mécanisme de révision administrative interne, on lui aurait opposé l’arrêt *Harekin*, précité, de notre Cour. Dans cette affaire, la

faculty committee of the University of Regina which found his academic performance to be unsatisfactory. The faculty committee was required to act in a judicial manner but failed, as here, to give proper notice and an opportunity to be heard. It was held that the failure did not deprive the faculty committee of its adjudicative jurisdiction. Its decision was subject to judicial review, but this was refused in the exercise of the Court's discretion. Adoption of the appellant's theory in this case would create an anomalous result. If she is correct that the ESA officer stepped outside her judicial role and lost jurisdiction for all purposes, including issue estoppel, the *Harekin* barrier to judicial review would be neatly sidestepped. She would have no need to seek judicial review to set aside the ESA decision. She would be, on her theory, entitled as of right to have it ignored in her civil action.

The appellant's position would also create an anomalous situation under the rule against collateral attack. As noted by the respondent, the rejection of issue estoppel in this case would constitute, in a sense, a successful collateral attack on the ESA decision, which has been impeached neither by administrative review nor judicial review. On the appellant's theory, an excess of jurisdiction in the course of the ESA proceeding would prevent issue estoppel, even though *Maybrun*, *supra*, says that an act in excess of a jurisdiction which the decision maker initially possessed does not necessarily open the decision to collateral attack. It depends, according to *Maybrun*, on which forum

demande de contrôle judiciaire qu'avait présentée un étudiant de l'université de Regina en vue d'obtenir l'annulation de la décision rendue par un comité d'une faculté de cet établissement et portant que ses notes étaient insatisfaisantes a été rejetée. Ce comité était tenu d'agir judiciairement, mais, tout comme en l'espèce, il avait omis de donner à l'étudiant un préavis suffisant et la possibilité de se faire entendre. Il a été jugé que cette omission n'avait pas fait perdre au comité sa compétence juridictionnelle. La décision du comité était susceptible de contrôle judiciaire, mais notre Cour, dans l'exercice de son pouvoir discrétionnaire, a refusé de faire droit à ce recours. Retenir la thèse de l'appelante en l'espèce entraînerait un résultat anormal. Si elle a raison de prétendre que l'agente des normes d'emploi a cessé d'agir judiciairement et a perdu compétence, à tout point de vue, y compris pour l'application de la préclusion découlant d'une question déjà tranchée, l'obstacle au contrôle judiciaire que constitue l'arrêt *Harekin* serait habilement contourné. Elle n'aurait en effet pas besoin de demander le contrôle judiciaire de la décision de l'agente pour la faire annuler puisque, selon ce qu'elle soutient, elle a d'office droit à ce qu'on n'en tienne pas compte dans le cadre de son action au civil.

La thèse avancée par l'appelante créerait également une situation anormale pour ce qui concerne la règle prohibant les contestations indirectes. Comme l'a souligné l'intimée, le refus d'appliquer la préclusion découlant d'une question déjà tranchée en l'espèce équivaldrait, en un sens, à faire droit à une contestation indirecte de la décision de l'agente des normes d'emploi, décision qui n'a été contestée ni par voie de révision administrative ni par voie de contrôle judiciaire. Suivant la thèse de l'appelante, un excès de compétence pendant le déroulement de la procédure administrative prévue par la LNE empêche l'application de la préclusion découlant d'une question déjà tranchée, bien que dans l'arrêt *Maybrun*, précité, notre Cour ait dit qu'une mesure outrepassant la compétence que possédait initialement le décideur ne donne pas nécessairement ouverture aux contestations indirectes de cette décision. Suivant cet arrêt, tout dépend du forum devant lequel le législateur a

the legislature intended the jurisdictional attack to be made in, the administrative review forum or the court (para. 49).

voulu que soit présentée la contestation d'ordre juridictionnel, savoir le tribunal administratif chargé de la révision ou une cour de justice (par. 49).

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It seems to me that the unsuccessful litigant in administrative proceedings should be encouraged to pursue whatever administrative remedy is available. Here, it is worth repeating, she elected the ESA forum. Employers and employees should be able to rely on ESA determinations unless steps are taken promptly to set them aside. One major legislative objective of the ESA scheme is to facilitate a quick resolution of termination benefits so that both employee and employer can get on to other things. Where, as here, the ESA issues are determined within a year, a contract claim could nevertheless still be commenced thereafter in Ontario within six years of the alleged breach, producing a lingering five years of uncertainty. This is to be discouraged.

À mon sens, il faut inciter le plaideur qui n'a pas gain de cause dans le cadre d'une instance administrative à se prévaloir de tous les recours administratifs qui lui sont ouverts. Il convient de rappeler que, en l'espèce, l'appelante a opté pour le recours prévu par la LNE. Tant les employeurs que les employés doivent être en mesure de s'en remettre aux décisions rendues sous le régime de la LNE à moins qu'une mesure ne soit prise rapidement pour en obtenir l'annulation. Un objectif important du régime établi par le législateur dans la LNE est de faciliter le règlement rapide des différends portant sur les indemnités de licenciement, de sorte que l'employé et l'employeur puissent tourner la page. Dans les cas où, comme en l'espèce, les questions touchant à l'application de la LNE sont tranchées dans un délai d'un an ou moins, il est néanmoins possible, en Ontario, d'intenter une action contractuelle dans les six ans qui suivent le manquement allégué, ce qui peut donner lieu à cinq années d'incertitude. De telles situations doivent être évitées.

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In summary, it is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. The conditions precedent to the adjudicative jurisdiction must be satisfied. Where arguments can be made that an administrative officer or tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law

En résumé, il est clair qu'une décision administrative qui a au départ été prise sans la compétence requise ne peut fonder l'application de la préclusion. Les conditions préalables à l'exercice de la compétence juridictionnelle doivent être réunies. Lorsqu'il est possible d'affirmer que le décideur administratif — fonctionnaire ou tribunal — avait initialement compétence pour rendre une décision de manière judiciaire, mais qu'il a commis une erreur dans l'exercice de cette compétence, la décision rendue est néanmoins susceptible de fonder l'application de la préclusion. Les erreurs qui auraient été commises dans l'accomplissement du mandat doivent être prises en considération par la cour de justice dans l'exercice de son pouvoir discrétionnaire. Cela a pour effet d'assurer la conformité du principe régissant la préclusion avec les règles de droit relatives au contrôle judiciaire énoncées dans l'arrêt *Hareldkin*, précité, et celles

governing judicial review in *Harekin*, *supra*, and collateral attack in *Maybrun*, *supra*.

Where I differ from the Ontario Court of Appeal in this case is in its conclusion that the failure of the appellant to seek such an administrative review of the ESA officer's flawed decision was fatal to her position. In my view, with respect, the refusal of the ESA officer to afford the appellant proper notice and the opportunity to be heard are matters of great importance in the exercise of the court's discretion, as will be seen.

I turn now to the three preconditions to issue estoppel set out by Dickson J. in *Angle*, *supra*, at p. 254.

3. Issue Estoppel: Applying the Tests

(a) *That the Same Question Has Been Decided*

A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: *Poucher v. Wilkins* (1915), 33 O.L.R. 125 (C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. It is apparent that different causes of action may have one or more material facts in common. In this case, for example, the existence of an employment contract is a material fact common to both the ESA proceeding and to the appellant's wrongful dismissal claim in court. Issue estoppel simply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be relitigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law

relatives aux contestations indirectes énoncées dans l'arrêt *Maybrun*, précité.

Là où je diverge d'opinion avec la Cour d'appel de l'Ontario, c'est relativement à sa conclusion que le fait pour l'appelante de ne pas avoir demandé la révision administrative de la décision lacunaire de l'agent porte un coup fatal à la thèse de l'appelante. En toute déférence, je suis d'avis que le refus de l'agent des normes d'emploi de donner à l'appelante un préavis suffisant et la possibilité de se faire entendre est un facteur très important dans l'exercice du pouvoir discrétionnaire de la cour, comme nous le verrons plus loin.

Je vais maintenant examiner les trois conditions d'application de la préclusion découlant d'une question déjà tranchée énoncées par le juge Dickson dans l'arrêt *Angle*, précité, p. 254.

3. La préclusion découlant d'une question déjà tranchée : application des conditions

a) *La condition requérant que la même question ait déjà été tranchée*

Traditionnellement, on définit la cause d'action comme étant tous les faits que le demandeur doit prouver, s'ils sont contestés, pour étayer son droit d'obtenir jugement de la cour en sa faveur : *Poucher c. Wilkins* (1915), 33 O.L.R. 125 (C.A.). Pour que le demandeur ait gain de cause, chacun de ces faits (souvent qualifiés de faits substantiels) doit donc être établi. Il est évident que des causes d'action différentes peuvent avoir en commun un ou plusieurs faits substantiels. En l'espèce, par exemple, l'existence d'un contrat de travail est un fait substantiel commun au recours administratif et à l'action pour congédiement injustifié intentée au civil par l'appelante. L'application de la préclusion découlant d'une question déjà tranchée signifie simplement que, dans le cas où le tribunal judiciaire ou administratif compétent a conclu, sur le fondement d'éléments de preuve ou d'admissions, à l'existence (ou à l'inexistence) d'un fait pertinent — par exemple un contrat de travail valable —, cette même question ne peut être débattue à nouveau dans le cadre d'une instance ultérieure opposant les mêmes parties. En d'autres termes, la pré-

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that are necessarily bound up with the determination of that “issue” in the prior proceeding.

clusion vise les questions de fait, les questions de droit ainsi que les questions mixtes de fait et de droit qui sont nécessairement liées à la résolution de cette « question » dans l’instance antérieure.

55 The parties are agreed here that the “same issue” requirement is satisfied. In the appellant’s wrongful dismissal action, she is claiming \$300,000 in unpaid commissions. This puts in issue the same entitlement as was refused her in the ESA proceeding. One or more of the factual or legal issues essential to this entitlement were necessarily determined against her in the earlier ESA proceeding. If issue estoppel applies, it prevents her from asserting that these adverse findings ought now to be found in her favour.

En l’espèce, les parties conviennent que la condition relative à l’existence d’une « même question » est remplie. Dans son action pour congédiement injustifié, l’appelante réclame 300 000 \$ à titre de commissions impayées. Cela met en jeu le droit même qui lui a été refusé dans le cadre de l’instance fondée sur la LNE. Une ou plusieurs des questions de fait ou de droit essentielles à la reconnaissance de ce droit ont nécessairement été tranchées en faveur de l’employeur dans le cadre de la procédure administrative. Si la préclusion découlant d’une question déjà tranchée s’applique, cela a pour effet d’empêcher l’appelante de soutenir que ces questions devraient maintenant être tranchées en sa faveur.

(b) *That the Judicial Decision Which Is Said to Create the Estoppel Was Final*

b) *La condition requérant que la décision judiciaire qui entraînerait l’application de la préclusion ait un caractère définitif*

56 As already discussed, the requirement that the prior decision be “judicial” (as opposed to administrative or legislative) is satisfied in this case.

Comme il a été indiqué plus tôt, la condition requérant que la décision antérieure soit une décision « judiciaire » (plutôt qu’administrative ou législative) est satisfaite en l’espèce.

57 Further, I agree with the Ontario Court of Appeal that the employee not having taken advantage of the internal review procedure, the decision of the ESA officer was final for the purposes of the Act and therefore capable in the normal course of events of giving rise to an estoppel.

En outre, je souscris à l’opinion de la Cour d’appel de l’Ontario selon laquelle, en raison du fait que l’employée ne s’est pas prévalu du mécanisme de révision interne, la décision de l’agente des normes d’emploi avait un caractère définitif pour l’application de la Loi et était donc susceptible, dans le cours normal des choses, de faire naître la préclusion.

58 I have already noted that in this case, unlike *Harelkin*, *supra*, the appellant had no right of appeal. She could merely make a request to the ESA Director for a review by an ESA adjudicator. While this may be a factor in the exercise of the discretion to deny issue estoppel, it does not affect the finality of the ESA decision. The appellant could fairly argue on a judicial review application that unlike *Harelkin* she had no “adequate alternative remedy” available to her as of right. The ESA

J’ai déjà souligné que, en l’espèce, contrairement à l’affaire *Harelkin*, précitée, l’appelante ne disposait d’aucun droit d’appel. Elle pouvait uniquement demander au directeur de faire réviser par un arbitre la décision de l’agente des normes d’emploi. Bien qu’il puisse s’agir d’un facteur à prendre en considération dans l’exercice du pouvoir discrétionnaire de refuser l’application de la préclusion découlant d’une question déjà tranchée, il n’a aucun effet sur le caractère définitif de la décision.

decision must nevertheless be treated as final for present purposes.

- (c) *That the Parties to the Judicial Decision or Their Privies Were the Same Persons as the Parties to the Proceedings in Which the Estoppel Is Raised or Their Privies*

This requirement assures mutuality. If the limitation did not exist, a stranger to the earlier proceeding could insist that a party thereto be bound in subsequent litigation by the findings in the earlier litigation even though the stranger, who became a party only to the subsequent litigation, would not be: *Machin, supra*; *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.), *per* Laskin J.A., at pp. 339-40. The mutuality requirement was subject to some critical comment by McEachern C.J.B.C. when sitting as a trial judge in *Saskatoon Credit Union Ltd. v. Central Park Ent. Ltd.* (1988), 22 B.C.L.R. (2d) 89 (S.C.), at p. 96, and has been substantially modified in many jurisdictions in the United States: see *Holmsted and Watson, supra*, at 21§24, and G. D. Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 *Can. Bar Rev.* 623.

The concept of "privity" of course is somewhat elastic. The learned editors of J. Sopinka, S. N. Lederman and A. W. Bryant in *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1088 say, somewhat pessimistically, that "[i]t is impossible to be categorical about the degree of interest which will create privity" and that determinations must be made on a case-by-case basis. In this case, the parties are identical and the outer limits of "mutuality" and of the "same parties" requirement need not be further addressed.

L'appelante pourrait à juste titre prétendre, dans le cadre d'une demande de contrôle judiciaire, que contrairement à M. Harelkin elle ne disposait pas, de plein droit, d'un autre « recours approprié ». Néanmoins, la décision de l'agente des normes d'emploi doit être tenue pour définitive pour les fins du présent pourvoi.

- (c) *La condition requérant que les parties à la décision judiciaire invoquée, ou leurs ayants droit, soient les mêmes que les parties aux procédures au cours desquelles la préclusion est plaidée, ou leurs ayants droit*

Cette condition garantit la réciprocité. Si elle ne s'appliquait pas, un tiers aux procédures antérieures pourrait exiger qu'une partie à celles-ci soit considérée comme liée, dans le cadre d'une instance ultérieure, par les conclusions tirées au cours des premières procédures, alors que ce tiers, qui ne serait partie qu'à la seconde instance, ne serait pas lié par ces conclusions : *Machin, précité*; *Minott c. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.), le juge Laskin, p. 339-340. Cette condition de réciprocité a fait l'objet de certaines critiques par le juge McEachern (plus tard Juge en chef de la Colombie-Britannique), pendant qu'il siégeait en première instance, dans l'affaire *Saskatoon Credit Union Ltd. c. Central Park Ent. Ltd.* (1988), 22 B.C.L.R. (2d) 89 (C.S.), p. 96, et elle a été modifiée de façon substantielle dans bon nombre d'États américains : voir *Holmsted et Watson, op. cit.*, 21§24, et G. D. Watson, « Duplicative Litigation : Issue Estoppel, Abuse of Process and the Death of Mutuality » (1990), 69 *R. du B. can.* 623.

Évidemment, la notion de « lien de droit » est assez élastique. J. Sopinka, S. N. Lederman et A. W. Bryant, les éminents éditeurs de l'ouvrage *The Law of Evidence in Canada* (2^e éd. 1999), affirment avec un certain pessimisme, à la p. 1088, qu'[TRADUCTION] « [i]l est impossible d'être catégorique quant à l'étendue de l'intérêt qui crée un lien de droit » et qu'il faut trancher au cas par cas. En l'espèce, les parties sont les mêmes et il n'y a pas lieu d'explorer davantage les confins des notions de « réciprocité » et d'« identité des parties ».

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61 I conclude that the preconditions to issue estoppel are met in this case.

4. The Exercise of the Discretion

62 The appellant submitted that the Court should nevertheless refuse to apply estoppel as a matter of discretion. There is no doubt that such a discretion exists. In *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72, Estey J. noted, at p. 101, that in the context of court proceedings “such a discretion must be very limited in application”. In my view the discretion is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers.

63 In *Bugbusters*, *supra*, Finch J.A. (now C.J.B.C.) observed, at para. 32:

It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.

Apart from noting parenthetically that estoppel *per rem judicatem* is generally considered a common law doctrine (unlike promissory estoppel which is clearly equitable in origin), I think this is a correct statement of the law. Finch J.A.’s *dictum* was adopted and applied by the Ontario Court of Appeal in *Schwenke*, *supra*, at paras. 38 and 43:

J’arrive à la conclusion que les conditions d’application de la préclusion découlant d’une question déjà tranchée sont réunies en l’espèce.

4. L’exercice du pouvoir discrétionnaire

L’appelante fait valoir que la Cour doit néanmoins exercer son pouvoir discrétionnaire et refuser l’application de la préclusion. Il ne fait aucun doute que ce pouvoir discrétionnaire existe. Dans l’arrêt *General Motors of Canada Ltd. c. Naken*, [1983] 1 R.C.S. 72, le juge Estey a souligné, à la p. 101, que dans le contexte d’une instance judiciaire « ce pouvoir discrétionnaire est très limité dans son application ». À mon avis, le pouvoir discrétionnaire est nécessairement plus étendu à l’égard des décisions des tribunaux administratifs, étant donné la diversité considérable des structures, missions et procédures des décideurs administratifs.

Dans l’arrêt *Bugbusters*, précité, le juge Finch de la Cour d’appel (maintenant Juge en chef de la Colombie-Britannique) a fait les observations suivantes, au par 32 :

[TRADUCTION] Il faut toujours se rappeler que, bien que les trois conditions d’application de la préclusion découlant d’une question déjà tranchée doivent être réunies pour que celle-ci puisse être invoquée, le fait que ces conditions soient présentes n’emporte pas nécessairement l’application de la préclusion. Il s’agit d’une doctrine issue de l’*equity* et, comme l’indique la jurisprudence, elle présente des liens étroits avec l’abus de procédure. Elle se veut un moyen de rendre justice et de protéger contre l’injustice. Elle implique inévitablement l’exercice par la cour de son pouvoir discrétionnaire pour assurer le respect de l’équité selon les circonstances propres à chaque espèce.

Mis à part, entre parenthèses, le fait que la préclusion *per rem judicatem* soit généralement considérée comme une doctrine de common law (contrairement à la préclusion fondée sur une promesse, qui tire clairement son origine de l’*equity*), j’estime qu’il s’agit d’un énoncé fidèle du droit applicable. Cette remarque incidente du juge Finch a été retenue et appliquée par la Cour d’appel de l’Ontario dans l’affaire *Schwenke*, précitée, par. 38 et 43 :

The discretion to refuse to give effect to issue estoppel becomes relevant only where the three prerequisites to the operation of the doctrine exist. . . . The exercise of the discretion is necessarily case specific and depends on the entirety of the circumstances. In exercising the discretion the court must ask — is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?

. . . .

. . . The discretion must respond to the realities of each case and not to abstract concerns that arise in virtually every case where the finding relied on to support the doctrine was made by a tribunal and not a court.

See also *Braithwaite*, *supra*, at para. 56.

Courts elsewhere in the Commonwealth apply similar principles. In *Arnold v. National Westminster Bank plc*, [1991] 3 All E.R. 41, the House of Lords exercised its discretion against the application of issue estoppel arising out of an earlier arbitration, *per* Lord Keith of Kinkel, at p. 50:

One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result

In the present case Rosenberg J.A. noted in passing at pp. 248-49 the possible existence of a potential discretion but, with respect, he gave it short shrift. There was no discussion or analysis of the merits of its exercise. He simply concluded, at p. 256:

In summary, Ms. Burke did not accord this appellant natural justice. The appellant's recourse was to seek review of Ms. Burke's decision. She failed to do so. That decision is binding upon her and her employer.

In my view it was an error of principle not to address the factors for and against the exercise of

[TRADUCTION] Le pouvoir discrétionnaire de refuser de donner effet à la préclusion découlant d'une question déjà tranchée ne naît que lorsque les trois conditions d'application de la doctrine sont réunies. [. . .] Ce pouvoir discrétionnaire est nécessairement exercé au cas par cas et son application dépend de l'ensemble des circonstances. Dans l'exercice de ce pouvoir discrétionnaire, la cour doit se poser la question suivante : existe-t-il, en l'espèce, une circonstance qui ferait en sorte que l'application normale de la doctrine créerait une injustice?

. . . .

. . . L'exercice du pouvoir discrétionnaire doit tenir compte des réalités propres à chaque affaire et non de préoccupations abstraites, qui sont présentes dans pratiquement tous les cas où la décision invoquée au soutien de la demande d'application a été rendue par un tribunal administratif et non par un tribunal judiciaire.

Voir également *Braithwaite*, précité, par. 56.

Les cours de justice d'autres pays du Commonwealth appliquent des principes analogues. Dans l'arrêt *Arnold c. National Westminster Bank plc*, [1991] 3 All E.R. 41, la Chambre des lords a exercé son pouvoir discrétionnaire et refusé d'appliquer la préclusion découlant d'une question déjà tranchée à l'égard d'une sentence arbitrale. Voici ce qu'a dit lord Keith of Kinkel, à la p. 50 :

[TRADUCTION] L'une des raisons d'être de la préclusion étant de rendre justice aux parties, il est loisible aux cours de justice de reconnaître que, dans certaines circonstances, son application rigide produirait l'effet contraire. . . .

Dans la présente affaire, le juge Rosenberg a mentionné, aux p. 248-249, l'existence possible d'un pouvoir discrétionnaire potentiel mais, en toute déférence, il ne s'y est pas attardé. Il n'a ni examiné ni analysé le bien-fondé de l'exercice de ce pouvoir. Il a simplement conclu ainsi, à la p. 256 :

[TRADUCTION] En résumé, M^{me} Burke n'a pas accordé à l'appelante le bénéfice des règles de justice naturelle. Le recours qui s'offrait à cette dernière était de demander la révision de la décision de l'agente. Elle ne l'a pas fait. Elle et son employeur sont liés par cette décision.

Je suis d'avis que la Cour d'appel a commis une erreur de principe en omettant de soupeser les fac-

the discretion which the court clearly possessed. This is not a situation where this Court is being asked by an appellant to substitute its opinion for that of the motions judge or the Court of Appeal. The appellant is entitled at some stage to appropriate consideration of the discretionary factors and to date this has not happened.

teurs favorables et défavorables à l'exercice du pouvoir discrétionnaire dont elle était clairement investie. Il ne s'agit pas d'un cas où notre Cour est invitée par la partie appelante à substituer son opinion à celle du juge des requêtes ou de la Cour d'appel. L'appelante a droit à ce que, à un certain point dans le processus, on examine de façon appropriée les facteurs pertinents à l'exercice du pouvoir discrétionnaire, et jusqu'à maintenant on ne l'a pas fait.

⁶⁷ The list of factors is open. They include many of the same factors listed in *Maybrun* in connection with the rule against collateral attack. A similarly helpful list was proposed by Laskin J.A. in *Minott*, *supra*. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case. Seven factors, discussed below, are relevant in this case.

La liste de ces facteurs n'est pas exhaustive. Elle comporte bon nombre de ceux qui ont été mentionnés dans l'arrêt *Maybrun* en rapport avec la règle prohibant les contestations indirectes. Le juge Laskin a lui aussi proposé une liste fort utile dans l'affaire *Minott*, précitée. L'objectif est de faire en sorte que l'application de la préclusion découlant d'une question déjà tranchée favorise l'administration ordonnée de la justice, mais pas au prix d'une injustice concrète dans une affaire donnée. Sept facteurs, mentionnés ci-après, sont pertinents dans la présente affaire.

(a) *The Wording of the Statute from which the Power to Issue the Administrative Order Derives*

a) *Le libellé du texte de loi accordant le pouvoir de rendre l'ordonnance administrative*

⁶⁸ In this case the ESA includes s. 6(1) which provides that:

En l'espèce, la LNE comporte le par. 6(1), qui prévoit ce qui suit :

No civil remedy of an employee against his or her employer is suspended or affected by this Act. [Emphasis added.]

La présente loi ne suspend pas les recours civils dont dispose un employé contre son employeur ni n'y porte atteinte. [Je souligne.]

⁶⁹ This provision suggests that at the time the Ontario legislature did not intend ESA proceedings to become an exclusive forum. (Recent amendments to the Act now require an employee to elect either the ESA procedure or the court. Even prior to the new amendments, however, a court could properly conclude that relitigation of an issue would be an abuse: *Rasanen*, *supra*, per Morden A.C.J.O., at p. 293, Carthy J.A., at p. 288.)

Cette disposition tend à indiquer que, à l'époque pertinente, le législateur ontarien n'entendait pas que le forum prévu par la LNE ait pour effet d'exclure tous les autres. (De récentes modifications apportées à la Loi obligent désormais l'employé à choisir entre la procédure prévue par la LNE ou le recours aux tribunaux judiciaires. Cependant, même avant ces modifications, les cours de justice pouvaient à bon droit conclure que l'engagement de nouvelles procédures à l'égard d'une question constituait un abus : *Rasanen*, précité, le juge en chef adjoint Morden de la Cour d'appel de l'Ontario, p. 293, le juge Carthy, p. 288.)

While it is generally reasonable for defendants to expect to be able to move on with their lives once one set of proceedings — including any available appeals — has ended in a rejection of liability, here, the appellant commenced her civil action against the respondents before the ESA officer reached a decision (as was clearly authorized by the statute at that time). Thus, the respondents were well aware, in law and in fact, that they were expected to respond to parallel and to some extent overlapping proceedings.

(b) *The Purpose of the Legislation*

The focus of an earlier administrative proceeding might be entirely different from that of the subsequent litigation, even though one or more of the same issues might be implicated. In *Bugbusters*, *supra*, a forestry company was compulsorily recruited to help fight a forest fire in British Columbia. It subsequently sought reimbursement for its expenses under the B.C. *Forest Act*, R.S.B.C. 1979, c. 140. The expense claim was allowed *despite* an allegation that the fire had been started by a Bugbusters employee who carelessly discarded his cigarette. (This, if proved, would have disentitled Bugbusters to reimbursement.) The Crown later started a \$5 million negligence claim against Bugbusters, for losses occasioned by the forest fire. Bugbusters invoked issue estoppel. The court, in the exercise of its discretion, denied relief. One reason, *per* Finch J.A., at para. 30, was that

a final decision on the Crown's right to recover its losses was not within the reasonable expectation of either party at the time of those [reimbursement] proceedings [under the *Forest Act*].

A similar point was made in *Rasanen*, *supra*, by Carthy J.A., at p. 290:

It would be unfair to an employee who sought out immediate and limited relief of \$4,000, forsaking dis-

Bien qu'il soit généralement raisonnable pour un défendeur d'escompter pouvoir tourner la page après des procédures — y compris tout appel possible — au terme desquelles sa responsabilité n'a pas été retenue, en l'espèce l'appelante a intenté son action civile contre les intimés avant que l'agente des normes d'emploi n'ait rendu sa décision (comme l'y autorisait clairement la loi pertinente à l'époque). En conséquence, les intimés savaient parfaitement, en droit et en fait, qu'ils devaient se défendre dans des procédures parallèles se chevauchant dans une certaine mesure.

b) *L'objet de la loi*

Il est fort possible que le nœud d'une instance administrative soit totalement différent de celui d'un litige subséquent, même si une ou plusieurs des questions litigieuses sont les mêmes. Dans l'affaire *Bugbusters*, précitée, une entreprise forestière a été conscrée afin d'aller combattre un incendie de forêt en Colombie-Britannique. Elle a par la suite demandé le remboursement de ses dépenses en vertu de la *Forest Act*, R.S.B.C. 1979, ch. 140, de cette province. On a fait droit à sa demande *malgré* des allégations selon lesquelles l'incendie avait été causé par un de ses employés qui aurait négligemment jeté une cigarette. (Si l'allégation avait été prouvée, Bugbusters n'aurait pas eu droit au remboursement.) Sa Majesté a par la suite intenté une action en négligence de 5 000 000 \$ contre Bugbusters pour être indemnisée des pertes occasionnées par le feu de forêt. Cette dernière a plaidé la préclusion découlant d'une question déjà tranchée. Exerçant son pouvoir discrétionnaire, la Cour d'appel a refusé d'appliquer la doctrine, notamment pour le motif suivant, exposé par le juge Finch, au par. 30 :

[TRADUCTION] . . . pendant l'instance [en remboursement fondée sur la *Forest Act*], aucune des parties ne pouvait raisonnablement s'attendre à ce qu'il soit statué définitivement sur le droit de Sa Majesté d'être indemnisée de ses pertes.

Une remarque au même effet a été formulée par le juge Carthy dans l'affaire *Rasanen*, précitée, p. 290 :

[TRADUCTION] Il serait injuste vis-à-vis d'un employé qui a demandé sans délai une indemnité limitée de

covery and representation in doing so, to then say that he is bound to the result as it affects a claim for ten times that amount.

A similar qualification is made in the American *Restatement of the Law, Second: Judgments 2d* (1982), vol. 2 § 83(2)(e), which refers to

procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

72 I am mindful, of course, that here the appellant chose the ESA forum. Counsel for the respondent justly observed, with some exasperation:

As the record makes clear, Danyluk was represented by legal counsel prior to, at the time of, and subsequent to the cessation of her employment. Danyluk and her counsel were well aware of the fact that Danyluk had an initial choice of forums with respect to her claim for unpaid commissions and wages. . . .

73 Nevertheless, the purpose of the ESA is to provide a relatively quick and cheap means of resolving employment disputes. Putting excessive weight on the ESA decision in terms of issue estoppel would likely compel the parties in such cases to mount a full-scale trial-type offence and defence, thus tending to defeat the expeditious operation of the ESA scheme as a whole. This would undermine fulfilment of the purpose of the legislation.

(c) *The Availability of an Appeal*

74 This factor corresponds to the “adequate alternative remedy” issue in judicial review: *Harelkin*, *supra*, at p. 592. Here the employee had no right of appeal, but the existence of a potential administrative review and her failure to take advantage of it

4 000 \$, renonçant de ce fait à la communication de la preuve et au droit d’être représenté par avocat, de lui opposer ensuite qu’il est lié par le résultat de ce recours et par son effet sur la réclamation d’une somme dix fois plus élevée.

Une réserve semblable est formulée dans l’ouvrage américain *Restatement of the Law, Second: Judgments 2d* (1982), vol. 2, § 83(2)(e), où l’on fait état

[TRADUCTION] . . . des éléments procéduraux requis pour que l’instance permette de régler décisivement le différend, compte tenu de l’ampleur et de la complexité de celui-ci, de l’urgence avec laquelle il faut le trancher et de la possibilité pour les parties de recueillir de la preuve et de formuler des arguments juridiques.

Je suis bien sûr conscient du fait que, en l’espèce, l’appelante a choisi la procédure prévue par la LNE. L’avocat de l’intimée a fait remarquer à juste titre, non sans une certaine exaspération :

[TRADUCTION] Comme l’indique clairement le dossier, M^{me} Danyluk était représentée par avocat avant la cessation d’emploi, au moment de celle-ci et par la suite. Son avocat et elle savaient fort bien qu’elle avait au départ le choix du forum devant lequel présenter sa réclamation pour salaire et commissions impayés. . . .

Néanmoins, l’objet de la LNE est d’offrir un moyen relativement rapide et peu coûteux de régler les différends entre employés et employeurs. Accorder un poids excessif aux décisions prises en vertu de la LNE, dans le contexte de l’application de la préclusion découlant d’une question déjà tranchée, obligerait vraisemblablement les parties, en pareils cas, à préparer une demande et une défense équivalentes à celles préparées dans le cadre d’un véritable procès et tendrait ainsi à enlever à l’ensemble du régime établi par la LNE son caractère expéditif. Cette situation compromettrait l’objectif visé par la loi.

c) *L’existence d’un droit d’appel*

Ce facteur correspond à celui de l’autre « recours approprié » applicable en matière de contrôle judiciaire : *Harelkin*, précité, p. 592. Dans la présente affaire, l’employée ne disposait d’aucun droit d’appel, mais la possibilité d’une révision

must be counted against her: *Susan Shoe Industries Ltd. v. Ricciardi* (1994), 18 O.R. (3d) 660 (C.A.), at p. 662.

(d) *The Safeguards Available to the Parties in the Administrative Procedure*

As already mentioned, quick and expeditious procedures suitable to accomplish the objectives of the ESA scheme may simply be inadequate to deal with complex issues of fact or law. Administrative bodies, being masters of their own procedures, may exclude evidence the court thinks probative, or act on evidence the court considers less than reliable. If it has done so, this may be a factor in the exercise of the court's discretion. Here the breach of natural justice is a key factor in the appellant's favour.

Morden A.C.J.O. pointed out in his concurring judgment in *Rasanen*, *supra*, at p. 295: "I do not exclude the possibility that deficiencies in the procedure relating to the first decision could properly be a factor in deciding whether or not to apply issue estoppel." Laskin J.A. made a similar point in *Minott*, *supra*, at pp. 341-42.

(e) *The Expertise of the Administrative Decision Maker*

In this case the ESA officer was a non-legally trained individual asked to decide a potentially complex issue of contract law. The rough-and-ready approach suitable to getting things done in the vast majority of ESA claims is not the expertise required here. A similar factor operates with respect to the rule against collateral attack (*Maybrun*, *supra*, at para. 50):

administrative et l'omission de s'en prévaloir doivent être retenues contre elle : *Susan Shoe Industries Ltd. c. Ricciardi* (1994), 18 O.R. (3d) 660, (C.A.), p. 662.

d) *Les garanties offertes aux parties dans le cadre de l'instance administrative*

Comme il a été mentionné précédemment, la procédure expéditive propre à permettre la réalisation des objectifs de la LNE peut tout simplement ne pas convenir pour l'examen de complexes questions de fait ou de droit. Étant maîtres de leur procédure, les organismes administratifs peuvent écarter des éléments de preuve que les cours de justice estiment probants ou encore agir sur le fondement d'éléments que ces dernières ne jugent pas fiables. Si cela s'est produit, il peut s'agir d'un facteur à prendre en compte dans l'exercice du pouvoir discrétionnaire de la cour. En l'espèce, le manquement aux règles de justice naturelle est un facteur clé en faveur de l'appelante.

Dans l'affaire *Rasanen*, précitée, p. 295, le juge en chef adjoint Morden a souligné le point suivant, dans ses motifs de jugement concourants : [TRADUCTION] « Je n'exclus pas la possibilité que des lacunes dans la procédure ayant conduit à la première décision puissent à juste titre constituer un facteur dans la décision d'appliquer ou non la préclusion découlant d'une question déjà tranchée. » Le juge Laskin de la Cour d'appel de l'Ontario a tenu des propos analogues dans l'affaire *Minott*, précitée, p. 341-342.

e) *L'expertise du décideur administratif*

Dans la présente affaire, l'agente des normes d'emploi, qui n'avait aucune formation juridique, était appelée à trancher une question potentiellement complexe en matière de droit des contrats. L'approche expéditive qui convient pour la grande majorité des demandes fondées sur la LNE n'est pas le genre d'expertise requise en l'espèce. Un facteur similaire s'applique à l'égard de la règle prohibant les contestations indirectes (*Maybrun*, précité, par. 50) :

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... where an attack on an order is based on considerations which are foreign to an administrative appeal tribunal's expertise or *raison d'être*, this suggests, although it is not conclusive in itself, that the legislature did not intend to reserve the exclusive authority to rule on the validity of the order to that tribunal.

(f) *The Circumstances Giving Rise to the Prior Administrative Proceedings*

78 In the appellant's favour, it may be said that she invoked the ESA procedure at a time of personal vulnerability with her dismissal looming. It is unlikely the legislature intended a summary procedure for smallish claims to become a barrier to closer consideration of more substantial claims. (The legislature's subsequent reduction of the monetary limit of an ESA claim to \$10,000 is consistent with this view.) As Laskin J.A. pointed out in *Minott*, *supra*, at pp. 341-42:

... employees apply for benefits when they are most vulnerable, immediately after losing their job. The urgency with which they must invariably seek relief compromises their ability to adequately put forward their case for benefits or to respond to the case against them ...

79 On the other hand, in this particular case it must be said that the appellant with or without legal advice, included in her ESA claim the \$300,000 commissions, and she must shoulder at least part of the responsibility for her resulting difficulties.

(g) *The Potential Injustice*

80 As a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice. Rosenberg J.A. concluded that the appellant had received neither notice of the respondent's allegation nor an opportunity to respond. He was thus confronted with the

... le fait que la contestation de l'ordonnance repose sur des considérations étrangères à l'expertise ou à la raison d'être d'une instance administrative d'appel suggère, sans toutefois être déterminant en lui-même, que le législateur n'a pas voulu réserver à cette instance le pouvoir exclusif de se prononcer sur la validité de l'ordonnance.

f) *Les circonstances ayant donné naissance à l'instance administrative initiale*

Un argument qui peut être avancé en faveur de l'appelante est qu'elle s'est prévalu du recours fondé sur la LNE à un moment où l'imminence de son congédiement faisait d'elle une personne vulnérable. Il est peu probable que le législateur ait voulu qu'une procédure sommaire applicable à la réclamation de petites sommes fasse obstacle à l'examen approfondi de réclamations plus considérables. (La décision ultérieure du législateur de plafonner à 10 000 \$ les réclamations pouvant être présentées en vertu de la LNE concorde avec cette interprétation.) Comme l'a fait observer le juge Laskin dans l'arrêt *Minott*, précité, p. 341-342 :

[TRADUCTION] ... les employés présentent une demande au moment où ils sont le plus vulnérables, soit immédiatement après la perte de leur emploi. Le fait qu'ils doivent invariablement agir rapidement pour demander réparation compromet leur aptitude à présenter adéquatement leur point de vue ou à réfuter la thèse de la partie adverse. ...

Par contre, il convient de rappeler que dans la présente affaire l'appelante, agissant alors de son propre chef ou sur les conseils de son avocat, a inclus dans sa demande fondée sur la LNE les 300 000 \$ réclamés à titre de commissions et elle doit assumer la responsabilité d'au moins une partie des difficultés résultant de cette décision.

g) *Le risque d'injustice*

Suivant ce dernier facteur, qui est aussi le plus important, notre Cour doit prendre un certain recul et, eu égard à l'ensemble des circonstances, se demander si, dans l'affaire dont elle est saisie, l'application de la préclusion découlant d'une question déjà tranchée entraînerait une injustice. Le juge Rosenberg de la Cour d'appel a conclu que l'appelante n'avait pas été informée des allégations

problem identified by Jackson J.A., dissenting, in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21:

The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.

Whatever the appellant's various procedural mistakes in this case, the stubborn fact remains that her claim to commissions worth \$300,000 has simply never been properly considered and adjudicated.

On considering the cumulative effect of the foregoing factors it is my view that the Court in its discretion should refuse to apply issue estoppel in this case.

V. Disposition

I would therefore allow the appeal with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: Lang Michener, Toronto.

Solicitors for the respondents: Heenan Blaikie, Toronto.

de l'intimée et n'avait pas eu la possibilité d'y répondre. Le juge Rosenberg était donc aux prises avec le problème signalé par le juge Jackson, dans ses motifs dissidents dans l'arrêt *Iron c. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1 (C.A. Sask.), p. 21 :

[TRADUCTION] Constituant un moyen de rendre justice aux parties dans le contexte d'une procédure contradictoire, la doctrine de l'autorité de la chose jugée porte en elle-même le germe de l'injustice, spécialement lorsque le droit des parties de se faire entendre est en jeu.

Indépendamment des diverses erreurs de nature procédurale commises par l'appelante en l'espèce, il n'en demeure pas moins que sa réclamation visant des commissions totalisant 300 000 \$ n'a tout simplement jamais été examinée et tranchée adéquatement.

Vu l'effet cumulatif des facteurs susmentionnés, je suis d'avis que notre Cour doit exercer son pouvoir discrétionnaire et refuser d'appliquer en l'espèce la préclusion découlant d'une question déjà tranchée.

V. Le dispositif

Je suis d'avis d'accueillir le pourvoi avec dépens devant toutes les cours.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante : Lang Michener, Toronto.

Procureurs des intimés : Heenan Blaikie, Toronto.

Ethel Annabelle Angle *Appellant*;

and

Minister of National Revenue *Respondent*.

1973: November 7; 1974: May 27.

Present: Martland, Judson, Spence, Laskin and Dickson JJ.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Estoppel—Benefit from construction by a controlled company—Assessment—Alleged debt of taxpayer to the company—Writ of extent against the taxpayer as debtor of the company—Whether principle of “issue estoppel” applicable.

Appellant, president and controlling shareholder of Transworld Explorations Limited, caused the company to construct a pool house, with furniture and fixtures, at the rear of her property. Six months after the foundations were in, appellant purported to lease to the company the whole of her property for five years at one dollar per year. After construction was complete, appellant leased the property to the company by a second lease for one year, at a rental of \$6,000 payable in monthly instalments of \$500. In order to create the impression that the pool house had been paid for, the husband of appellant arranged a bank loan of \$50,000 to appellant. This sum was deposited to the credit of the company, which could not withdraw it until the loan was paid. The husband then gave the appellant a cheque drawn on the company's account and signed by him as agent for the company in order that she could repay the bank loan, which she did.

Appellant was assessed under s. 8(1)(c) of the *Income Tax Act*, R.S.C. 1952, c. 148, \$52,243.58 for benefits from construction of the pool house, and \$5,995.82 for furniture and fixtures. On appeal the Exchequer Court concluded that appellant had received the house as owner of the freehold and that the procedure employed by appellant did not constitute payment for the house, and it affirmed the assessment except for the furniture and fixtures.

Some time after these proceedings the Minister of National Revenue, in an effort to collect arrears of taxes from another company, obtained *ex parte* an order for a writ of extent in the second degree,

Ethel Annabelle Angle *Appelante*;

et

Le Ministre du Revenu National *Intimé*.

1973: le 7 novembre; 1974: le 27 mai.

Présents: Les Juges Martland, Judson, Spence, Laskin et Dickson.

EN APPEL DE LA COUR DE L'ÉCHIQUIER DU CANADA.

Fin de non-recevoir—Bénéfice découlant de construction par une compagnie contrôlée—Cotisation—Prétendue dette de la contribuable envers la compagnie—Bref de saisie «in extent» contre la contribuable en tant que débitrice de la compagnie—Le principe de l'«issue estoppel» est-il applicable.

L'appelante, présidente et actionnaire contrôlant de Transworld Explorations Limited, a fait en sorte que cette compagnie construise à l'arrière de sa propriété un pavillon de bains avec mobilier et accessoires fixes. Six mois après que les fondations furent achevées, l'appelante a censément loué à la compagnie la totalité de sa propriété pour cinq ans, à un dollar par an. Une fois la construction terminée, elle lui a loué la propriété en vertu d'un second bail pour un an, à raison de \$6,000 payable par versements mensuels de \$500. Pour donner l'impression que le pavillon de bains avait été payé, le mari de l'appelante obtint de la banque qu'un prêt de \$50,000 soit fait à l'appelante. Cette somme fut déposée au crédit de la compagnie qui ne pouvait la retirer avant que le prêt ne soit remboursé. Le mari donna ensuite à l'appelante un chèque tiré sur le compte de la compagnie et signé par lui à titre de représentant de la compagnie pour qu'elle puisse rembourser le prêt bancaire, ce qu'elle fit.

L'appelante fut cotisée en vertu de l'art. 8c) de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148, pour \$52,243.58 pour bénéfices découlant de la construction du pavillon de bains ainsi que \$5,995.82 pour mobilier et accessoires fixes. En appel la Cour de l'Échiquier a conclu que l'appelante avait reçu le pavillon à titre de propriétaire de la tenure libre, que le moyen employé par l'appelante ne constituait pas un paiement du pavillon, et elle a confirmé la cotisation sauf à l'égard des meubles et accessoires fixes.

Quelques temps après ces procédures, le ministre du Revenu national, afin de percevoir d'une autre compagnie des arriérés de taxes, a obtenu *ex parte* une ordonnance pour bref de saisi «extent» au second

against Transworld as debtor of the other company; a writ of extent in the third degree was also issued against appellant as debtor of Transworld. Other writs of extent were also issued, but set aside following a motion to set aside; however, the writ issued against appellant was upheld. The latter appealed this decision, on the ground that the judgment of the Exchequer Court rendered the matter of appellant's alleged indebtedness *res judicata*.

Held (Spence and Laskin JJ. dissenting): The appeal should be dismissed.

Per Martland, Judson and Dickson JJ.: There is a distinction between the "cause of action estoppel" where another action is brought for the same cause of action as has been the subject of previous adjudication, and "issue estoppel" where, the cause of action being different, some point or issue of fact has already been decided. The requirements of issue estoppel are (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised, or their privies. The determination on which it is sought to found the estoppel must be so fundamental to the substantive decision that the latter cannot stand without the former.

The question to be decided in these proceedings was the existence of a debt by Mrs. Angle to Transworld, whereas the question in the earlier proceedings was the amount of Mrs. Angle's income tax assessment. The question not being *eadem questio*, this is not a case of issue estoppel.

The claim that Mrs. Angle is indebted to Transworld is founded upon her sworn statement during examination for discovery in the tax proceedings. The Transworld balance sheet confirmed her evidence. It is not alleged and there is no evidence to suggest that she subsequently paid her debt to the company.

Per Spence and Laskin JJ., *dissenting*: Leave was given to refer to the reasons in the original tax judgment and they showed that the pool house which gave rise to the "benefit" was also the foundation of

degré contre Transworld en tant que débitrice de l'autre compagnie; un bref de saisie «extent» au troisième degré fut aussi émis contre l'appelante en tant que débitrice de Transworld. D'autres brefs de saisie «extent» furent aussi émis, mais annulés à la suite d'une requête en annulation, alors que le bref émis contre l'appelante fut maintenu. Celle-ci en appelle de cette décision, pour le motif que le jugement de la Cour de l'Échiquier donne à la question de l'existence de la dette dont l'appelante serait redevable le caractère de chose jugée.

Arrêt: (les Juges Spence et Laskin étant dissidents): L'appel doit être rejeté.

Les Juges Martland, Judson et Dickson: Il y a une distinction entre le principe de l'autorité de la chose jugée applicable lorsqu'une demande est intentée pour la même cause d'action que celle qui a fait l'objet d'un jugement antérieur, et cette théorie de la fin de non-recevoir qu'on applique lorsqu'il arrive que la cause d'action est différente mais que des points ou questions de fait ont déjà été décidés. Les conditions de l'*issue estoppel* exigent (1) que la même question ait été décidée; (2) que la décision judiciaire invoquée comme créant la fin de non-recevoir soit finale; et, (3) que les parties dans la décision judiciaire invoquée, ou leurs ayants droit, soient les mêmes que les parties engagées dans l'affaire où la fin de non-recevoir est soulevée, ou leurs ayants droits. La décision sur laquelle on cherche à fonder la fin de non-recevoir doit avoir été si fondamentale à la décision rendue sur le fond même du litige que celle-ci ne peut valoir sans celle-là.

La question à être décidée en l'espèce, c'est l'existence d'une dette de M^{me} Angle envers Transworld alors que la question à être décidée dans l'affaire antérieure était celle du montant de la cotisation d'impôt de M^{me} Angle. La question n'étant pas *eadem questio*, il n'y a pas lieu d'appliquer le principe de l'*issue estoppel*.

La prétention suivant laquelle M^{me} Angle a une dette envers Transworld est fondée sur sa déclaration sous serment durant l'interrogatoire préalable dans l'affaire relative à l'impôt. Le bilan de Transworld au 31 janvier 1969 confirme son témoignage. Il n'est pas allégué qu'elle aurait par la suite payé sa dette envers la compagnie, et il n'y a pas de preuve qui le donne à penser.

Les Juges Spence et Laskin, dissidents: Autorisation a été accordée aux avocats représentant les parties de se référer aux motifs du jugement rendu dans l'affaire d'impôt et ils ont reconnu que la pavi-

the debt allegedly owing by appellant to Transworld. Further, the appellant and the Minister were parties both to the tax appeal and to the present proceedings, into which the appellant was drawn by the Minister through a writ of extent, albeit they had their origin in a tax claim against a third person. Because of the difference in the two proceedings, issue estoppel is what the appellant must stand on.

Issue estoppel, as a principle, has been recognized in Canadian law. The application of this principle is not in any way affected because it is directed against a Minister of the Crown. There is no reason to introduce any anomalies or exceptions to its general application if the facts call for it.

The Minister's contention that the pool house transaction can be both a benefit and a loan or debt at the same time ignores the basis upon which he sought and succeeded in his reassessment of the appellant, namely s. 8(1)(c). Any question of a loan, arising from the arrangements for a bank credit to Transworld which was ultimately repaid by a Transworld cheque (leaving Transworld and the appellant where they were before), was negated by the Exchequer Court as having been dependent upon a lease which was ineffective to support it. A device which failed as a defence to a reassessment, and so determined by a final judicial decision, cannot be later reactivated as between the same parties to provide a different basis upon which to attempt to capture the same sum twice.

[*Angle v. Minister of National Revenue*, [1969] C.T.C. 624; *Thoday v. Thoday*, [1964] P. 181; *Hoysted v. Federal Commissioner of Taxation* (1921), 29 C.L.R. 537, [1926] A.C. 155; *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853; *Duchess of Kingston's Case* (1776), 20 St. Tr. 355, 538n; *R. v. Hutchings* (1881), 6 Q.B.D. 300; *Society of Medical Officers of Health v. Hope*, [1960] A.C. 551; *Spens v. I.R.C.*, [1970] 3 All. E.R. 295; *Curlett v. Minister of National Revenue*, [1961] Ex. C.R. 427, aff. 62 D.T.C. 1320; *R. v. Poynton*, [1972] 3 O.R. 727; *Attorney General for Trinidad and Tobago v. Enriché*, [1893] A.C. 518, referred to.]

lon de bains qui avait constitué le «bénéfice» était aussi le fondement de la dette qu'on allègue être due par l'appelante à Transworld. De plus l'appelante et le Ministre se trouvent à avoir été parties tant à l'appel en matière d'impôt qu'aux procédures en l'espèce, dans lesquelles l'appelante a été plongée par le Ministre au moyen d'un bref de saisie «extent» bien qu'elles aient pris naissance dans une réclamation d'impôt contre une tierce personne. A cause de la différence qui existe entre les deux instances, c'est sur l'issue estoppel que l'appelante doit s'appuyer.

L'issue estoppel, en tant que principe est reconnu dans le droit canadien. L'application de ce principe n'est pas atteinte parce qu'il est invoqué à l'encontre d'un ministre de la Couronne. Il n'y a aucune raison d'introduire des anomalies ou des exceptions à son application générale si les faits permettent de l'invoquer.

La prétention du Ministre que la transaction relative au pavillon de bains peut être à la fois un bénéfice et un emprunt ou une dette en même temps ne tient pas compte du fondement sur lequel il a voulu et obtenu la nouvelle cotisation qu'il recherchait à l'égard de l'appelante, soit l'art. 8(1)c). Toute évocation d'un prêt, résultant des dispositions prises pour que la banque émette en faveur de Transworld un crédit qui en définitive a été remboursé par un chèque de Transworld (laissant Transworld et l'appelante dans la situation où elles étaient auparavant), a été repoussée par la Cour de l'Échiquier comme subordonnée à un bail qui ne pouvait efficacement lui servir de fondement. Un expédient qui a failli comme moyen de défense à l'encontre d'une nouvelle cotisation, et qui est donc réglé par une décision judiciaire finale ne peut être par la suite réactivé entre les mêmes parties de façon à fournir une base différente sur laquelle tenter de capturer la même somme une seconde fois.

[Arrêts mentionnés: *Angle v. Minister of National Revenue*, [1969] C.T.C.624; *Thoday v. Thoday*, [1964] P. 181; *Hoysted v. Federal Commissioner of Taxation* (1921), 29 C.L.R. 537, [1926] A.C. 155; *Carl Zeiss Stiftung c. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853; *Duchess of Kingston's Case* (1776), 20 St. Tr. 355, 538n; *R. v. Hutchings* (1881), 6 Q.B.D. 300; *Society of Medical Officers of Health v. Hope*, [1960] A.C. 551; *Spens v. I.R.C.*, [1970] 3 All. E.R. 295; *Curlett c. Le ministre du Revenu national*, [1961] R.C.É. 427, conf. 62 D.T.C. 1320; *R. c. Poynton*, [1972] 3 O.R. 727; *Attorney General for Trinidad and Tobago v. Enriché*, [1893] A.C. 518.]

APPEAL from a judgment of the Exchequer Court of Canada ordering that a writ of extent be issued. Appeal dismissed, Spence and Laskin JJ. dissenting.

C. C. Sturrock, for the appellant.

N. A. Chalmers, Q.C., and *G. O. Eggertson*, for the respondent.

The judgment of Martland, Judson and Dickson JJ. was delivered by

DICKSON J.—In early 1966 Mrs. Angle caused Transworld Explorations Limited, a company of which she was president and controlling shareholder, to construct at the expense of the company, an indoor swimming pool, sauna bath, mineral bath, barbecue, bar, fireplace, sitting room and office at the rear of property owned by her on Stevens Drive in West Vancouver, British Columbia. The then s. 8(1) (c) of the *Income Tax Act* provided that where a benefit or advantage was conferred on a shareholder by a corporation the amount or value would be included in computing the income of the shareholder and, acting under the section, the taxing authorities added to Mrs. Angle's income for the years 1966 and 1967 a total of \$52,243.58 for benefits from construction of the pool house and \$5,995.82 for furniture and fixtures. Mrs. Angle appealed the assessment. The appeal was heard by Sheppard D.J. in the Exchequer Court of Canada¹ and judgment was delivered on November 17, 1969. The judge defined what he referred to as the basic issues in these words:

That the pool house (i) was received by the appellant as lessor not as "shareholder" within Section 8(1)(c), (ii) was paid for by the appellant and therefore was not "a benefit or advantage" (iii) or in any event was a benefit received only on expiration of a lease, therefore not in 1966 or 1967 but in 1968.

The short facts and the manner in which the judge disposed of each of the issues follow:

¹ [1969] C.T.C. 624.

APPEL d'un jugement de la Cour de l'Échiquier du Canada ordonnant l'émission d'un bref de saisie «extent». Appel rejeté, les Juges Spence et Laskin étant dissidents.

C. C. Sturrock, pour l'appelante.

N. A. Chalmers, c.r., et *G. O. Eggertson*, pour l'intimé.

Le jugement des Juges Martland, Judson et Dickson a été rendu par

LE JUGE DICKSON—Au début de 1966, M^{me} Angle a fait en sorte que Transworld Explorations Limited, une compagnie dont elle était présidente et actionnaire contrôlant, construisait à l'arrière de la propriété que M^{me} Angle possédait sur Stevens Drive à West Vancouver, Colombie-Britannique, une piscine intérieure, sauna, bain d'eau thermale, barbecue, bar, foyer, vivoir et bureau. A cette époque-là l'al. c) du par. (1) de l'art. 8 de la *Loi de l'impôt sur le revenu* prévoyait que lorsqu'un bénéfice ou un avantage était attribué à un actionnaire par une corporation, le montant ou la valeur en l'espèce devait être inclus dans le calcul du revenu de l'actionnaire, et invoquant cet article les fonctionnaires du fisc ajoutèrent au revenu de M^{me} Angle des années 1966 et 1967 un total de \$52,243.58 pour bénéfices découlant de la construction du pavillon de bains, ainsi que \$5,995.82 pour mobilier et accessoires fixes. M^{me} Angle en appela de la cotisation. L'appel fut entendu par M. le Juge suppléant Sheppard en Cour de l'Échiquier du Canada¹ et jugement fut rendu le 17 novembre 1969. Le juge a défini comme suit ce qu'il a appelé les questions fondamentales:

Que le pavillon de bains (i) a été reçu par l'appelante en qualité de bailleur et non «d'actionnaire» au sens de l'article 8(1)c), (ii) qu'il a été payé par l'appelante, et ne constituait donc pas «un bénéfice ou un avantage», (iii) et que de toute façon, il s'agissait d'un bénéfice reçu seulement à l'expiration du bail, soit en 1968 et non en 1966 et 1967.

Voici maintenant l'exposé sommaire des faits et la façon dont le juge a décidé chacune des questions:

¹ [1969] C.T.C. 624.

(i) On November 1, 1966, six months after the foundations of the pool house were built and after receiving advice that the value of the pool house might be added to her income, Mrs. Angle purported to lease to Transworld the whole of her lot on Stevens Drive for a term of five years at a rental of one dollar per year. A year later, on November 27, 1967, after the pool house had been constructed, a second lease was entered into whereby she purported to lease the property to Transworld for a term of one year at a rental of \$6,000 payable \$500 per month. The judge held that the pool house was not received by Mrs. Angle as lessor because it was let into the soil: that is, construction was begun before there was any lease; the leases did not operate to divest Mrs. Angle of the pool house vested in her as owner of the freehold and accordingly the benefit was not received by her as lessor but as owner.

(ii) The scheme by which it was sought to create the impression that Mrs. Angle had paid for the pool house took this form. Her husband arranged for the Toronto-Dominion Bank to loan her \$50,000 on December 27, 1967. The proceeds of the loan were deposited to the credit of Transworld but, as the money was assigned to the bank as security for the loan, it could not be withdrawn by Transworld until the loan was paid. In February 1968 Mr. Angle gave Mrs. Angle a cheque for \$50,000 drawn on the Transworld account and signed by him as agent for the company with which she repaid the bank loan. The judge rightly concluded that this trumpery did not amount to payment for the pool house.

(iii) The judge rejected Mrs. Angle's contention that no benefit would vest in her until the expiration of the lease, holding that the benefit vested not by virtue of an assignment or conveyance by the lessee, but by virtue of Mrs.

(i) Le 1^{er} novembre 1966, six mois après l'achèvement des fondations du pavillon de bains et après qu'on lui eut appris que la valeur du pavillon pourrait être ajoutée à son revenu, M^{me} Angle a censément loué à Transworld la totalité de son lot sur Stevens Drive, pour une période de cinq ans au loyer d'un dollar par an. Un an plus tard, le 27 novembre 1967, après que la construction de la piscine eut été terminée, un second bail est intervenu en vertu duquel la propriété était censément louée à Transworld par M^{me} Angle pour une période d'un an, en contrepartie d'un loyer de \$6,000 payable par versements mensuels de \$500. Le juge a décidé que M^{me} Angle n'avait pas reçu le pavillon de bains à titre de bailleur parce que le pavillon avait été loué incorporé au sol; c'est-à-dire, la construction avait débuté avant qu'il n'y ait de bail; les baux n'avaient pas eu pour effet de priver M^{me} Angle du pavillon de bains dévolu à elle en sa qualité de propriétaire de la tenure libre (*freehold*) du fonds et, par conséquent, c'est à titre de propriétaire et non de bailleur qu'elle avait reçu le bénéfice.

(ii) Le plan conçu pour donner l'impression que M^{me} Angle avait payé le pavillon de bains a été mis à exécution de la façon suivante. Le mari fit les arrangements nécessaires pour que la Banque Toronto-Dominion prête \$50,000 à M^{me} Angle le 27 décembre 1967. La somme provenant de cet emprunt fut déposée au crédit de Transworld mais, comme l'argent avait été cédé à la banque en garantie du prêt, Transworld ne pouvait pas le retirer avant que le prêt soit remboursé. Au mois de février 1968, M. Angle donna à M^{me} Angle un chèque de \$50,000 tiré sur le compte de Transworld et signé par lui à titre de représentant de la compagnie, et M^{me} Angle remboursa le prêt bancaire au moyen de ce chèque. Le juge a conclu à bon droit que cet artifice ne constituait pas un paiement du coût de la piscine.

(iii) Le juge a rejeté la présentation de M^{me} Angle selon laquelle aucun bénéfice ne devait être dévolu à cette dernière avant l'expiration du bail, décidant que le bénéfice lui avait été dévolu non pas du fait d'une cession ou trans-

Angle being the owner of the freehold on which the building was erected. In the result the judge dismissed the appeal and confirmed the assessment except as to furniture and fixtures.

Some time after the proceedings in the Exchequer Court, the Minister of National Revenue sought to collect arrears of taxes amounting to \$40,266.71 from a company, Kansas City Traders Ltd., and obtained a Writ of Extent ordering the sheriff of the County of Vancouver to extend and seize the assets of that company in the amount of the arrears. There being small prospect of collecting directly from Kansas City Traders, the Minister obtained *ex parte* an order for the issuance of a Writ of Extent in the Second Degree against Transworld in the amount of \$40,266.71, Transworld being indebted to Kansas City Traders; a Writ in the Third Degree against Mrs. Angle in the amount of \$34,612.33, on the allegation that Mrs. Angle was indebted to Transworld in this sum; a Writ of Extent in the Fourth Degree against Mr. and Mrs. Adolf Franz Bauer, purchasers in 1968 of the Stevens Drive property from Mrs. Angle; and a Writ of Extent in the Fifth Degree against the legal firm which acted for Mrs. Angle on the sale. A motion was brought before Sheppard D.J. to set aside the writs issued against Mrs. Angle, against Mr. and Mrs. Bauer and against the legal firm. As a result, the writs against Mr. and Mrs. Bauer and against the legal firm were set aside but the writ against Mrs. Angle allowed to stand. An appeal has now been taken to this Court on behalf of Mrs. Angle, the main ground being that the judgment of the Exchequer Court rendered the matter of Mrs. Angle's alleged indebtedness to Transworld *res judicata*.

In earlier times *res judicata* in its operation as estoppel was referred to as estoppel by record, that is to say, estoppel by the written record of a court of record, but now the generic term more frequently found is estoppel *per rem*

port par le locataire, mais du fait de sa qualité de propriétaire de la tenure libre du bien-fonds sur lequel le bâtiment avait été érigé. Le juge a rejeté l'appel et confirmé la cotisation sauf à l'égard des meubles et des accessoires fixes.

Quelque temps après les procédures en Cour de l'Échiquier, le ministre du Revenu national a tenté de percevoir d'une compagnie, Kansas City Traders Ltd., des arriérés de taxes s'élevant à \$40,266.71, et il a obtenu un bref de saisie «extent» ordonnant au shériff du comté de Vancouver d'évaluer et de saisir les biens de cette compagnie-là pour le montant des arriérés. La possibilité de percevoir le montant directement de Kansas City Traders s'avérant mince, le Ministre a obtenu *ex parte* une ordonnance prévoyant l'émission d'un bref de saisie «extent» au second degré contre Transworld pour le montant de \$40,266.71, Transworld étant débitrice de Kansas City Traders; un bref de troisième degré contre M^{me} Angle pour le montant de \$34,612.33, sur allégation que cette dernière était débitrice de Transworld pour cette somme; un bref de saisie «extent» au quatrième degré contre M. et M^{me} Adolf Franz Bauer, qui en 1968 avaient acheté de M^{me} Angle la propriété de Stevens Drive; et un bref de saisie «extent» au cinquième degré contre l'étude d'avocats qui avait représenté M^{me} Angle lors de la vente de la propriété. Devant le Juge suppléant Sheppard on présenta une requête en vue de faire annuler les brefs émis contre M^{me} Angle, contre M. et M^{me} Bauer et contre l'étude d'avocats. Les brefs émis contre M. et M^{me} Bauer et contre l'étude d'avocats furent annulés mais le bref émis contre M^{me} Angle fut maintenu en vigueur. Un appel est maintenant interjeté devant cette Cour au nom de M^{me} Angle, le motif principal étant que le jugement de la Cour de l'Échiquier donne à la question de l'existence d'une dette dont serait redevable M^{me} Angle envers Transworld, le caractère de chose jugée.

Anciennement, la chose jugée en tant que fin de non-recevoir (*estoppel*) était appelée *estoppel by record*, c'est-à-dire, une fin de non-recevoir de par l'effet des registres et procès-verbaux d'une cour d'archives, mais maintenant on

judicatam. This form of estoppel, as Diplock L.J. said in *Thoday v. Thoday*², at p. 198, has two species. The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction. We are not here concerned with cause of action estoppel as the Minister's present claim that Mrs. Angle is indebted to Transworld in the sum of \$34,612.33 is obviously not the cause of action which came before the Exchequer Court in the s. 8(1)(c) proceedings. The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins J. of the High Court of Australia in *Hoysted v. Federal Commissioner of Taxation*³, at p. 561:

I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").

Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*⁴, at p. 935, defined the requirements of issue estoppel as:

... (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies

Is the question to be decided in these proceedings, namely the indebtedness of Mrs. Angle to Transworld Explorations Limited, the same as was contested in the earlier proceedings? If it is

emploie le plus souvent l'expression générique *estoppel per rem judicatam*. Cette forme de fin de non-recevoir, comme le Lord Juge Diplock l'a dit dans l'arrêt *Thoday v. Thoday*², est de deux sortes. Le premier, soit le «*cause of action estoppel*», empêche une personne d'intenter une action contre une autre lorsque la même cause d'action a déjà été décidée dans des procédures antérieures par un tribunal compétent. En l'espèce, nous n'avons pas à nous préoccuper du *cause of action estoppel* puisque l'allégation du Ministre selon laquelle M^{me} Angle doit la somme de \$34,612.33 à Transworld, n'est évidemment pas la cause d'action dont la Cour de l'Échiquier a été saisie dans les procédures relatives à l'al. c) du par. (1) de l'art. 8. La deuxième sorte d'*estoppel per rem judicatam* est connue sous le nom d'*issue estoppel*, expression qui a été créée par le Juge Higgins de la Haute Cour d'Australie dans l'arrêt *Hoysted v. Federal Commissioner of Taxation*³, à la p. 561:

[TRADUCTION] Je reconnais pleinement la distinction entre le principe de l'autorité de la chose jugée applicable lorsqu'une demande est intentée pour la même cause d'action que celle qui a fait l'objet d'un jugement antérieur, et cette théorie de la fin de non-recevoir qu'on applique lorsqu'il arrive que la cause d'action est différente mais que des points ou questions de fait on déjà été décidés (laquelle je puis appeler théorie de l'*«issue-estoppel»*).

Lord Guest, dans l'arrêt *Carl Zeiss Stiftung c. Rayner & Keeler Ltd. (No. 2)*⁴, à la p. 935, définit les conditions de l'*«issue estoppel»* comme exigeant:

[TRADUCTION] . . . (1) que la même question ait été décidée; (2) que la décision judiciaire invoquée comme créant la fin de non-recevoir soit finale; et, (3) que les parties dans la décision judiciaire invoquée, ou leurs ayants droit, soient les mêmes que les parties engagées dans l'affaire où la fin de non-recevoir est soulevée, ou leurs ayants droit . . .

Est-ce que la question à être décidée en l'espèce, c'est-à-dire l'existence d'une dette de M^{me} Angle envers Transworld Explorations Limited, est la même que celle que l'on a débattue dans

² [1964] P. 181.

³ (1921), 29 C.L.R. 537.

⁴ [1967] 1 A.C. 853.

² [1964] P. 181.

³ (1921), 29 C.L.R. 537.

⁴ [1967] 1 A.C. 853.

not, there is no estoppel. It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment. That is plain from the words of De Grey C.J. in the *Duchess of Kingston's case*⁵, quoted by Lord Selborne L.J. in *R. v. Hutchings*⁶, at p. 304, and by Lord Radcliffe in *Society of Medical Officers of Health v. Hope*⁷. The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceedings: *per* Lord Shaw in *Hoystead v. Commissioner of Taxation*⁸. The authors of Spencer Bower and Turner, *Doctrine of Res Judicata*, 2nd ed. pp. 181, 182, quoted by Megarry J. in *Spens v. I.R.C.*⁹, at p. 301, set forth in these words the nature of the enquiry which must be made:

... whether the determination on which it is sought to found the estoppel is "so fundamental" to the substantive decision that the latter *cannot stand* without the former. Nothing less than this will do.

The claim in the present proceedings that Mrs. Angle is indebted to Transworld in the amount of \$34,612.33 is founded upon a sworn statement of Mrs. Angle, during her examination for discovery in the tax proceedings, that she owed Transworld a balance of \$34,000, being \$50,000 less a credit for shares transferred by her to Transworld. The Transworld balance sheet as at January 31, 1969 confirmed her evidence. It showed \$34,612.33 to be "Due from shareholder".

In my opinion the question to be decided in these proceedings is not the same question as was decided in the earlier proceedings. The primary question in the earlier proceedings was the amount of Mrs. Angle's income tax assessment

l'affaire antérieure? Si elle ne l'est pas, il n'y a pas de fin de non-recevoir. Il ne suffira pas que la question ait été soulevée de façon annexe ou incidente dans l'affaire antérieure ou qu'elle doive être inférée du jugement par raisonnement. Cela ressort clairement des termes employés par le Juge en chef De Grey dans l'arrêt *Duchess of Kingston's*⁵, cités par Lord Selborne dans *Reg. v. Hutchings*⁶, à la p. 304, et par Lord Radcliffe dans *Society of Medical Officers of Health v. Hope*⁷. La question qui est censée donner lieu à la fin de non-recevoir doit avoir été «fondamentale à la décision à laquelle on est arrivé» dans l'affaire antérieure: d'après Lord Shaw dans l'arrêt *Hoystead v. Commissioner of Taxation*⁸. Les auteurs de l'ouvrage Spencer Bower and Turner, *Doctrine of Res Judicata*, 2e éd. pp. 181, 182, cité par M. le Juge Megarry dans l'arrêt *Spens v. I.R.C.*⁹, à la p. 301, décrivent dans les termes suivants la nature de l'examen auquel on doit procéder:

[TRADUCTION] ... si la décision sur laquelle on cherche à fonder la fin de non-recevoir a été «si fondamentale» à la décision rendue sur le fond même du litige que celle-ci *ne peut valoir* sans celle-là. Rien de moins ne suffira.

La prétention en l'espèce suivant laquelle M^{me} Angle doit à Transworld la somme de \$34,612.33 est fondée sur une déclaration sous serment de M^{me} Angle, durant son interrogatoire préalable dans l'affaire relative à l'impôt, aux termes de laquelle elle devait à Transworld un solde de \$34,000, soit \$50,000 moins un crédit pour des actions qu'elle avait transférées à Transworld. Le bilan de Transworld au 31 janvier 1969 confirme son témoignage. Y figure un montant de \$34,612.33, avec l'inscription «Dû par un actionnaire».

A mon avis la question à être décidée en l'espèce n'est pas la même que celle qui a été décidée dans l'affaire antérieure. Dans l'affaire antérieure, la question principale était celle du montant de la cotisation d'impôt de M^{me} Angle,

⁵ (1776), 20 St. Tr. 355, 538n.

⁶ (1881), 6 Q.B.D. 300.

⁷ [1960] A.C. 551.

⁸ [1926] A.C. 155.

⁹ [1970] 3 All. E.R. 295.

⁵ (1776), 20 St. Tr. 355, 538n.

⁶ (1881), 6 Q.B.D. 300.

⁷ [1960] A.C. 551.

⁸ [1926] A.C. 155.

⁹ [1970] 3 All. E.R. 295.

and in order to determine that issue it was necessary to consider several subsidiary issues raised by Mrs. Angle in support of her appeal. I have quoted the judge's statement of those issues and in effect they were (i) that the pool house was received by her as a lessor and not as a shareholder or (ii) alternatively, that she had paid for the pool house through the \$50,000 bank loan. A submission that she was still indebted for the pool house would have been impossible to reconcile with her contention that the pool house had been paid for.

A finding of no liability by Mrs. Angle to Transworld was not legally indispensable to the judgment on the income tax appeal or a necessary finding to support that judgment. A tax assessment in respect of a benefit or advantage received is not inconsistent with an obligation to pay for the benefit or advantage where, for example, there is no apparent intention to honour the obligation. The decision that a taxable benefit has been received can stand in an appropriate case with an alleged obligation to pay for that benefit. See *Curlett v. Minister of National Revenue*¹⁰; and *R. v. Poynton*¹¹. In these proceedings the Minister is claiming from Mrs. Angle payment of indebtedness to Transworld. If Transworld or its shareholders were suing Mrs. Angle for recovery of corporate funds expended on the construction of the pool house, the s. 8(1)(c) proceedings in the Exchequer Court would afford her no defence. It is true that one of the leases contained a clause whereby Transworld purported to surrender to Mrs. Angle all its interest in the improvements for \$49,768.51 and when the lease was struck down this clause suffered a similar fate. But that was not, and was not tantamount to, a finding that Mrs. Angle was not indebted to Transworld. Transworld was not a party to the proceedings and the Exchequer Court did not have jurisdiction to make such a finding.

et pour décider cette question-là il était nécessaire d'examiner plusieurs questions subsidiaires qu'avait soulevées M^{me} Angle à l'appui de son appel. J'ai cité l'énoncé que le juge a fait de ces questions, qui étaient en somme (i) que le pavillon de bains avait été reçu à titre de bailleur et non d'actionnaire ou (ii), subsidiairement, qu'elle avait payé le pavillon au moyen d'un prêt bancaire de \$50,000. Une allégation suivant laquelle elle était encore endettée à l'égard du pavillon aurait été impossible à réconcilier avec sa prétention selon laquelle elle avait payé pour ce pavillon.

Il n'était pas juridiquement indispensable, pour rendre jugement sur l'appel concernant l'impôt, ni même nécessaire, pour étayer ce jugement, d'en arriver à la conclusion que M^{me} Angle n'était pas débitrice de Transworld. Une cotisation d'impôt à l'égard d'un bénéfice ou d'un avantage reçu n'est pas incompatible avec une obligation de payer pour ce bénéfice ou avantage lorsque, par exemple, il n'existe pas d'intention apparente d'honorer l'obligation. Une décision qu'un bénéfice imposable a été reçu peut, dans un cas approprié, coexister avec une obligation alléguée de payer pour ce bénéfice. Voir *Curlett c. Le ministre du Revenu national*¹⁰, arrêt confirmé par cette Cour; et *R. c. Poynton*¹¹. En l'espèce, le ministre réclame de M^{me} Angle qu'elle paie le montant de sa dette envers Transworld. Si Transworld ou ses actionnaires poursuivaient M^{me} Angle pour recouvrer le montant des fonds de la compagnie dépensés pour la construction du pavillon de bains, les procédures mues en Cour d'Échiquier relativement à l'al. c) du par. (1) de l'art. 8 ne pourraient donner de moyen de défense à M^{me} Angle. Il est vrai que l'un des baux incluait une clause par laquelle Transworld était censée céder à M^{me} Angle tous ses droits dans les améliorations pour la somme de \$49,768.51, et que lorsque le bail a été infirmé cette clause a connu le même sort. Mais cela n'était pas une conclusion que M^{me} Angle n'avait pas de dette envers Transworld, et n'était pas l'équivalent d'une telle con-

¹⁰ [1961] Ex. C.R. 427, affd. 62 D.T.C. 1320.

¹¹ [1972] 3 O.R. 727.

¹⁰ [1961] R.C.É 427, conf. 62 D.T.C. 1320.

¹¹ [1972] 3 O.R. 727.

As long ago as 1893, Lord Hobhouse said in the Privy Council in *Attorney General for Trinidad and Tobago v. Eriché*¹², at p. 522:

It is hardly necessary to refer at length to authorities for the elementary principle that in order to establish the plea of *res judicata* the judgment relied on must have been pronounced by a Court having concurrent or exclusive jurisdiction directly upon the point. In the *Duchess of Kingston's Case*, Sm. L.C. vol. ii. p. 642, which is constantly referred to for the law on this subject, it is laid down that in order to establish the plea of *res judicata* the Court whose judgment is invoked must have had jurisdiction and have given judgment directly upon the matter in question; but that if the matter came collaterally into question in the first Court, or were only incidentally cognizable by it, or merely to be inferred by argument from the judgment, the judgment is not conclusive.

The question not being *eadem questio*, I am of the opinion that this is not a case for application of the principle of issue estoppel.

Two collateral points were taken on behalf of Mrs. Angle. First, that there was no evidence upon the *ex parte* application for the issuance of the writs of extent as to how the alleged debt from Transworld to Kansas City Traders Ltd. arose or, if there was a debt, that it was payable. No objection was taken in the Court below to the writs of extent issued against Kansas City Traders Ltd. or against Transworld. Transworld has not challenged the writ against it, and it is not open to Mrs. Angle to do so at this time. Second, that even if Mrs. Angle was indebted to Transworld, there was no evidence she was indebted after January 31, 1969 and more particularly at the time of the application for the writs of extent, October 30, 1970. On discovery

¹² [1893] A.C. 518.

clusion. Transworld n'était pas partie aux procédures et la Cour de l'Échiquier n'avait pas compétence pour en arriver à une conclusion semblable.

Dès 1893, Lord Hobhouse, dans une décision du Conseil Privé rendue dans l'affaire *Attorney General for Trinidad and Tobago v. Eriché*¹², disait, à la p. 522:

[TRADUCTION] Il n'est guère nécessaire de se reporter longuement aux précédents pour reconnaître ce principe élémentaire selon lequel, pour établir le moyen de chose jugée, le jugement sur lequel on se fonde doit avoir été rendu par un tribunal ayant compétence simultanée ou exclusive directement sur le point. Dans l'arrêt *Duchess of Kingston*, Sm. L.C. vol. ii. p. 642, auquel on se réfère constamment pour énoncer le droit à ce sujet, on pose le principe que pour établir le moyen de chose jugée le tribunal dont le jugement est invoqué doit avoir eu compétence et avoir rendu jugement directement sur la question en litige; mais si la question est venue en cause de façon annexe dans le premier tribunal, ou si celui-ci ne pouvait en connaître que de façon incidente, ou si on devait simplement l'inférer du jugement par raisonnement, le jugement n'est pas concluant.

La question n'étant pas *eadem questio*, je suis d'avis qu'en l'espèce il n'y a pas lieu d'appliquer le principe de l'issue estoppel.

Deux questions annexes ont été soulevées au nom de M^{me} Angle. Premièrement, on dit que lors de la demande *ex parte* pour la délivrance des brefs de saisie «extent» il n'y avait pas de preuve sur l'origine de la dette de Transworld envers Kansas City Traders Ltd., ou que si dette il y avait il n'y avait pas de preuve que la dette était échue. Devant les cours d'instance inférieure, on ne s'est aucunement opposé aux brefs de saisie «extent» émis contre Kansas City Traders Ltd. ou contre Transworld. Transworld n'a pas attaqué le bref de saisie «extent» émis contre elle et il n'appartient pas à M^{me} Angle de le faire à ce stade-ci. Deuxièmement, on dit, même si M^{me} Angle était débitrice de Transworld, il n'y avait aucune preuve selon laquelle

¹² [1893] A.C. 518.

October 6, 1969 Mrs. Angle said she was indebted to Transworld. The books of account and records of Transworld were taken out of the country by Mrs. Angle and her husband on leaving Canada in 1968 to reside in Las Vegas, Nevada and Mrs. Angle has since refused to produce those books and records. It is not alleged and there is no evidence to suggest that since October 6, 1969 she paid Transworld the amount of her debt to that company. There is an affidavit of a Las Vegas chartered accountant stating that the decision of the Exchequer Court eliminated the character of the indebtedness of \$34,612.33 as a debt or loan, and a similar affidavit of a Vancouver solicitor, but as I have indicated, I am of the opinion that the decision of the Exchequer Court did not have any such effect.

I would accordingly dismiss the appeal with costs.

The judgment of Spence and Laskin JJ was delivered by

LASKIN J. (*dissenting*)—This appeal concerns the propriety of a writ of extent in the third degree issued against the appellant at the instance of the respondent Minister. On the motion to set aside the writ, the sufficiency of the material upon which the *ex parte* application for the writ was made was challenged. Beyond that, it was contended that the basic foundation for the writ, an alleged debt owing to the second degree debtor who in turn was indebted to the first degree debtor from whom the Minister claimed unpaid income taxes, could not be asserted by the Minister because of the preclusive effect of *res judicata*. I am of the opinion that the more appropriate preclusive principle in this case is issue estoppel and that the appellant is entitled to succeed on that ground. I find it unnecessary therefore to deal with the alleged

elle l'était encore après le 31 janvier 1969, et plus particulièrement lors de la demande d'émission de brefs de saisie «extent» faite le 30 octobre 1970. Lors de son interrogatoire préalable, le 6 octobre 1969, M^{me} Angle a déclaré avoir une dette envers Transworld. Les livres de comptes, dossiers et registres de Transworld ont été transportés hors du pays par M^{me} Angle et son époux lorsqu'ils ont, en 1968, laissé le Canada pour aller demeurer à Las Vegas, Nevada, et M^{me} Angle a depuis refusé de produire ces livres, dossiers et registres. Il n'est pas allégué qu'elle aurait, depuis le 6 octobre 1969, payé à Transworld le montant de sa dette envers la compagnie, et il n'y a pas de preuve qui le donne à penser. Il existe une déclaration écrite faite sous serment par un comptable agréé de Las Vegas qui affirme que le jugement de la Cour de l'Échiquier a supprimé le caractère de dette ou d'emprunt de l'obligation afférente au montant de \$34,612.33, de même qu'une déclaration écrite similaire faite sous serment par un avocat de Vancouver, mais comme je l'ai mentionné je suis d'avis que le jugement de la Cour de l'Échiquier n'a pas eu d'effet semblable.

Je suis d'avis, par conséquent, de rejeter l'appel avec dépens.

Le jugement des Juges Spence et Laskin a été rendu par

LE JUGE LASKIN (*dissident*)—Cet appel concerne le droit d'émettre un bref de saisie «extent» de troisième degré délivré contre l'appelante à la demande du Ministre intimé. Lors de la requête en annulation du bref, on a contesté la suffisance des documents sur lesquels la demande faite *ex parte* pour l'émission du bref avait été faite. En plus, on a prétendu que le fondement de base pour l'émission du bref, soit un montant allégué être dû au débiteur du deuxième degré qui lui-même était débiteur du débiteur du premier degré de qui le Ministre réclamait le paiement d'impôts impayés, ne pouvait pas être invoqué par le Ministre, vu l'empêchement découlant de la chose jugée. Je suis d'avis que le principe qui peut le mieux justifier un empêchement en l'espèce est celui de l'*issue estoppel* (fin de non-recevoir à la remise en

deficiency of supporting material for the issue of the writ of extent against the appellant.

On October 3, 1968, a writ of extent was issued against Kansas City Traders Ltd. for the recovery out of its assets of \$103,395.03 for unpaid taxes. By October, 1970, the amount of its indebtedness had been reduced to \$40,266.71. On October 30, 1970, a successful application was made by the Minister for the issue of writs of extent in the second, third, fourth and fifth degrees against, respectively, Transworld Exploration Ltd., in the amount of \$40,266.71 as being indebted to Kansas City in the amount of \$44,707.70; the appellant, in the amount of \$34,612.33, as being the amount of a debt owing by her to Transworld; and a firm of lawyers who acted for the appellant and were assignees of an agreement of sale of her house and the purchasers of the house under the agreement for sale, also in the amount of \$34,612.33. On motion to set aside the writs of extent in the third, fourth and fifth degrees, the motion succeeded as to the firm of lawyers and as to the purchasers of the house, but was dismissed as to the appellant.

The *ex parte* application for the writs of extent herein and the motion to set them aside were heard by Deputy Judge F. A. Sheppard of the Exchequer Court. He had also presided at the appeal of the appellant herein against a tax assessment which involved adding to her taxable income for the years 1966 and 1967 the value of a "benefit", being a pool house constructed at the rear of her residence by Transworld. At that time the appellant was the principal shareholder and president of Transworld; and, despite her central contention that she was indebted to Transworld for the cost of the pool house, she was unable to persuade Sheppard J. that the Minister was wrong in assessing her for it as a benefit under the then s. 8(1)(c) of the

cause d'une question déjà décidée), et que sur ce moyen l'appelante a le droit d'avoir gain de cause. Je considère qu'il ne m'est donc pas nécessaire de traiter de l'insuffisance alléguée des documents justificatifs fournis en vue de l'émission du bref de saisie «extent» contre l'appelante.

Le 3 octobre 1968, un bref de saisie «extent» a été délivré contre Kansas City Traders Ltd. afin de percevoir sur ses biens la somme de \$103,395.93 pour des impôts impayés. En octobre 1970, le montant de sa dette était tombé à \$40,266.71. Le 30 octobre 1970, le Ministre a obtenu la délivrance de brefs de saisie «extent» aux deuxième, troisième, quatrième et cinquième degrés contre, respectivement, Transworld Exploration Ltd., au montant de \$40,266.71, en tant que débitrice envers Kansas City de la somme de \$44,707.70; l'appelante, au montant de \$34,612.33, censé être le montant d'une dette de celle-ci envers Transworld; et une étude d'avocats autrefois mandataire de l'appelante et devenue cessionnaire du contrat de vente de sa maison ainsi que les acheteurs de la maison en vertu de ce contrat, également au montant de \$34,612.33. Une requête en annulation des brefs de saisie «extent» aux troisième, quatrième et cinquième degrés a été accueillie à l'égard de l'étude d'avocats et des acheteurs de la maison mais elle a été rejetée à l'égard de l'appelante.

La demande *ex parte* en vue de l'émission de ces brefs de saisie «extent» et la requête visant à les faire annuler ont été entendues par M. le Juge suppléant Sheppard de la Cour de l'Échiquier. Il avait aussi présidé l'audition d'un appel de l'appelante à l'encontre d'une cotisation d'impôt ajoutant au revenu imposable de l'appelante, pour les années 1966 et 1967, la valeur d'un «bénéfice», soit un pavillon de bains construit à l'arrière de sa résidence par Transworld. A cette époque-là, l'appelante était le principal actionnaire et la présidente de Transworld; et, en dépit de sa prétention principale selon laquelle elle était débitrice de Transworld pour le coût du pavillon de bains, elle n'avait pu convaincre M. le Juge Sheppard que le Ministre avait eu tort de

Income Tax Act, R.S.C. 1952, c. 148, as amended. Judgment against the appellant was given in reasons delivered on November 17, 1969, long before the application for a writ of extent against her: see *Angle v. Minister of National Revenue*¹³. It is under this judgment that issue estoppel arises.

On the motion to set aside the writs of extent, Sheppard J. refused to consider his reasons for judgment in the appellant's tax appeal, speaking on this point as follows:

There was no proof of the reasons for judgment nor that the alleged benefit or advantage within the reasons was the alleged indebtedness of Mrs. Angle to Transworld. For Mrs. Angle, it was contended that as the same judge was hearing the motion who had determined the judgment . . . therefore judicial notice could be taken of the judgment. The judgment is not a fact of which judicial notice may be taken.

There are occasions when insistence on excessive technicality (especially when the Crown or a Minister of the Crown in his official capacity is involved) gives credence to Mr. Bumble's well-known remonstrance in Dickens' "*Oliver Twist*." In this Court, leave was given to refer to the reasons in the tax judgment and, that done, counsel for the appellant and for the Minister agreed to the obvious, namely, that the pool house which gave rise to the "benefit" was also the foundation of the debt allegedly owing by the appellant to Transworld. I turn, therefore, to consider what was determined in the tax appeal and why it gives rise to issue estoppel in the present proceeding.

In adding \$51,482.26 to the appellant's income for 1966 and another \$4,912.94 for

¹³ [1969] C.T.C. 624.

l'inclure comme bénéfice dans le calcul de son impôt en vertu de ce qui était alors l'al. c) du par. (1) de l'art. 8 de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148, modifiée. Le jugement rendu contre l'appelante l'a été dans des motifs déposés le 17 novembre 1969, longtemps avant la demande faite en vue de l'émission d'un bref de saisie «extent» contre elle: voir *Angle v. Minister of National Revenue*¹³. C'est de ce jugement que découle l'issue estoppel.

Lors de la requête en annulation des brefs de saisie "extent", M. le Juge Sheppard a refusé de considérer les motifs du jugement qu'il avait rendu dans l'appel que l'appelante avait interjeté contre le fisc, et il s'est exprimé sur ce point de la façon suivante:

La preuve des motifs du jugement n'a pas été faite et il n'a pas été prouvé que le bénéfice ou l'avantage prétendu visé par ces motifs constitue la dette préten due de M^{me} Angle envers la Transworld. Au nom de M^{me} Angle, on a soutenu que le juge saisi de la requête étant celui-là même qui avait rendu le jugement . . . il s'ensuivait que connaissance judiciaire pouvait être prise de son jugement. Le jugement n'est pas un fait dont il peut être pris connaissance judiciaire.

Il est des occasions où l'insistance sur des exigences exagérées de procédure (particulièrement lorsque la Couronne ou un ministre de la Couronne en sa qualité officielle est concerné) fait ajouter foi à la remontrance bien connue de M. Bumble dans l'*Oliver Twist* de Dicken's. En cette Cour, autorisation a été accordée aux avocats de se référer aux motifs du jugement rendu dans l'affaire d'impôt et, cela ayant été fait, les avocats représentant l'appelante et le Ministre ont convenu de reconnaître ce qui était évident, soit, que le pavillon de bains qui avait constitué le «bénéfice» était aussi le fondement de la dette qu'on allègue être due par l'appelante à Transworld. Par conséquent, je passe à ce qui a été décidé dans l'appel interjeté en matière d'impôt et à la raison pour laquelle cela donne ouverture à l'issue estoppel en l'espèce.

En ajoutant \$51,482.26 au revenu de l'appelante pour l'année 1966 et un autre montant de

¹³ [1969] C.T.C. 624.

1967, as benefits from the construction of the pool house by Transworld, the Minister invoked s. 8(1)(c). His position was upheld by Sheppard J., save for the deduction of \$4,151.62 from the additional reassessment for 1966, representing the value of some furniture and fixtures. It is desirable to set out s. 8(1) and (2) in whole, and those provisions are as follows:

8. (1) Where, in a taxation year,

(a) a payment has been made by a corporation to a shareholder otherwise than pursuant to a bona fide business transaction,

(b) funds or property of a corporation having been appropriated in any manner whatsoever to, or for the benefit of, a shareholder, or

(c) a benefit or advantage has been conferred on a shareholder by a corporation, otherwise than

(i) on the reduction of capital, the redemption of shares or the winding-up, discontinuance or reorganization of its business,

(ii) by payment of a stock dividend, or

(iii) by conferring on all holders of common shares in the capital of the corporation a right to buy additional common shares therein

the amount or value thereof shall be included in computing the income of the shareholder for the year.

8. (2) Where a corporation has, in a taxation year, made a loan to a shareholder, the amount thereof shall be deemed to have been received by the shareholder as a dividend in the year unless

(a) the loan was made

(i) in the ordinary course of its business and the lending of money was part of its ordinary business,

(ii) to an officer or servant of the corporation to enable or assist him to purchase or erect a dwelling house for his own occupation,

(iii) to an officer or servant of the corporation to enable or assist him to purchase from the corporation fully paid shares of the corporation to be held by him for his own benefit, or

\$4,912.94 pour 1967, à titre de bénéfices résultant de la construction du pavillon de bains par Transworld, le Ministre s'était fondé sur l'al. c) du par. (1) de l'art. 8. Sa position fut maintenue par M. le Juge Sheppard, sauf pour le retranchement d'une somme de \$4,151.62 de la nouvelle cotisation supplémentaire afférente à l'année 1966, représentant la valeur de certains meubles et accessoires fixes. Il convient de reproduire les par. (1) et (2) de l'art. 8 au complet, ces dispositions se lisant comme suit:

8. (1) Lorsque, dans une année d'imposition,

a) un paiement a été fait par une corporation à un actionnaire autrement qu'en vertu d'une opération commerciale authentique,

b) des fonds ou biens d'une corporation ont été affectés de quelque manière que ce soit à un actionnaire ou à son avantage, ou

c) un bénéfice ou un avantage a été attribué à un actionnaire par une corporation, autrement

(i) Qu'à l'occasion de la réduction de capital, du rachat d'actions, ou de la liquidation, cessation ou réorganisation de son entreprise,

(ii) qu'en payant un dividende sous forme d'actions, ou

(iii) qu'en conférant à tous les détenteurs d'actions ordinaires du capital de la corporation un droit d'y acheter des actions ordinaires additionnelles,

le montant ou valeur en l'espèce est inclus dans le calcul du revenu de l'actionnaire pour l'année.

8. (2) Lorsque, dans une année d'imposition, une corporation a consenti un prêt à un actionnaire, le montant de ce prêt est censé avoir été reçu par l'actionnaire à titre de dividende au cours de l'année, à moins que

a) le prêt n'ait été consenti

(i) dans le cours ordinaire de ses affaires et que les affaires ordinaires ne comprennent le prêt d'argent,

(ii) à un fonctionnaire ou préposé de la corporation pour lui permettre ou lui faciliter l'achat ou la construction d'une maison d'habitation qu'il occupera lui-même,

(iii) à un fonctionnaire ou préposé de la corporation pour lui permettre ou lui faciliter l'achat, de la corporation, d'actions libérées de celle-ci qu'il détiendra pour son propre bénéfice, ou

(iv) to an officer or servant of the corporation to enable or assist him to purchase an automobile to be used by him in the performance of the duties of his office or employment,

and bona fide arrangements were made at the time the loan was made for repayment thereof within a reasonable time, or

(b) the loan was repaid within one year from the end of the taxation year of the corporation in which it was made and it is established, by subsequent events or otherwise, that the repayment was not made as part of a series of loans and repayments.

Appellant contested the reassessment of her income on the ground that she did not obtain the pool house as a shareholder but as a lessor, that she was genuinely indebted to Transworld for it and that if there was any benefit it was received at the expiry of an alleged lease in 1968. None of these contentions was made out, and appellant's counsel said in this Court that it could be taken that Mrs. Angle did not expect to have to pay for the pool house. Although her attempted evasion of tax liability through a leasing scheme was exposed as a sham this does not make her contention in the present proceeding unsupportable. It is the Minister and not Mrs. Angle who is taking an inconsistent position in the light of what was decided in the tax appeal.

The appellant and the Minister were parties both to the tax appeal and to the present proceedings, into which the appellant was drawn by the Minister through a writ of extent, albeit they had their origin in a tax claim against a third person. Because of the difference in the two proceedings, it is not *res judicata* in its cause of action sense upon which the appellant can rely. Issue estoppel is what she must stand on and, as a principle, it is nothing new either in this Court or in the Courts of sister jurisdictions like the United Kingdom, Australia and the United States: see *Carl Zeiss Stiftung v. Rayner and*

(iv) à un fonctionnaire ou préposé de la corporation pour lui permettre ou lui faciliter l'achat d'une automobile dont il se servira dans l'accomplissement des fonctions de sa charge ou de son emploi,

et que des arrangements de bonne foi n'aient été conclus, lorsque le prêt a été consenti en vue de son remboursement dans un délai raisonnable, ou

b) le prêt n'ait été remboursé dans l'année à compter de la fin de l'année d'imposition de la corporation au cours de laquelle il avait été consenti et qu'il ne soit établi par les événements subséquents ou d'autre façon que le remboursement n'a pas été fait comme partie d'une série de prêts et de remboursements.

L'appelante avait contesté la nouvelle cotisation de son impôt pour le motif qu'elle n'avait pas obtenu le pavillon de bains à titre d'actionnaire, mais à titre de bailleur, qu'elle était réellement débitrice envers Transworld pour le coût de ce pavillon et que s'il y avait eu quelque bénéfice, celui-ci avait été reçu à l'expiration d'un bail en 1968. Aucune de ces prétentions ne fut prouvée comme fondée et l'avocat de l'appelante nous dit qu'on peut prendre pour acquis que M^{me} Angle ne s'attend pas à devoir payer pour le pavillon de bains. Même si sa tentative d'évasion fiscale au moyen d'un plan de location fut exposée au grand jour comme étant une simulation, cela ne rend pas sans fondement la prétention qu'elle avance en l'espèce présente. C'est le Ministre et non M^{me} Angle qui adopte une position incompatible à la lumière de ce qui a été décidé dans l'appel interjeté en matière d'impôt.

L'appelante et le Ministre se trouvent à avoir été parties tant à l'appel en matière d'impôt qu'aux procédures en l'espèce, dans lesquelles l'appelante a été plongée par le Ministre au moyen d'un bref de saisie «extent», bien qu'elles aient pris naissance dans une réclamation d'impôt contre une tierce personne. À cause de la différence qui existe entre les deux instances, ce n'est pas la chose jugée dans le sens d'une identité de causes d'action (*cause of action sense*) que l'appelante peut invoquer ici. C'est sur l'*issue estoppel* qu'elle doit s'appuyer et, en tant que principe, celui-ci n'est quelque chose

*Keeler Ltd. (No. 2)*¹⁴; *Thoday v. Thoday*¹⁵; *Blair v. Curran*¹⁶; Note, *Collateral Estoppel by Judgment*, (1952), 52 Col. L. Rev. 647.

There is no mystery as to what was decided in the tax appeal, *Angle v. Minister of National Revenue*, *supra*. An alleged lease to Transworld of the appellant's residential property (including the pool house) and an associated loan arrangement relating to a release by Transworld of its interest in the pool house for the sum of approximately \$50,000 were both held to be ineffective. The associated loan was a circular arrangement which resulted in Transworld paying off the loan to itself; and for good measure Sheppard J. held that there could be no obligation of the appellant to pay the \$50,000 because it was conditional upon the surrender by Transworld of its rights in the pool house and it had none because title had already vested in the appellant as owner of the freehold. Thus, it was that the value of the pool house was taxable as a "benefit" under s. 8(1)(c).

On what basis then does the Minister contend that there is a debt owing to Transworld by the appellant for the pool house in the sum of \$34,612.33? This sum represents the balance after a credit of \$15,000 allowed against the total cost as being the value of certain shares in another company transferred by the appellant to Transworld. However, the appellant, in the same tax appeal in which the value of the pool house was assessed against her as a benefit, was also charged with a profit of \$12,750 on the transfer of the shares. Transworld's balance sheet as of January 31, 1969 shows \$34,612.33 as due from the appellant, with a note that "[it]

de nouveau ni en cette Cour ni dans les cours de ressorts apparentés avec le nôtre comme le Royaume Uni, l'Australie et les États-Unis: voir *Carl-Zeiss Stiftung v. Rayner and Keeler Ltd. (no. 2)*¹⁴; *Thoday v. Thoday*¹⁵, à la p. 197; *Blair v. Curran*¹⁶; Note, *Collateral Estoppel by Judgment*, (1952), 52 Col. L. Rev. 647.

Ce qui a été décidé dans l'appel en matière d'impôt, *Angle c. Ministre du Revenu national*, précité, n'est pas un mystère. Un bail qu'on aurait consenti à Transworld sur la propriété résidentielle de l'appelante (pavillon de bains compris) et, à cet égard, un prêt relatif à un abandon par Transworld de ses droits dans le pavillon contre une somme d'environ \$50,000, ont tous deux été déclarés inefficaces. Le prêt relié à la location était une opération en circuit fermé dont le résultat était que Transworld remboursait le prêt à elle-même; et par souci d'abondance M. le Juge Sheppard a statué qu'il ne pouvait y avoir d'obligation de l'appelante de payer les 50,000 dollars s'étant donné que cette obligation était subordonnée à la cession par Transworld de ses droits dans le pavillon et que Transworld n'en avait pas parce que le droit de propriété afférent au pavillon se trouvait déjà dévolu à l'appelante en sa qualité de propriétaire de la tenure libre. Ainsi, la valeur du pavillon de bains a été déclarée imposable à titre de «bénéfice» en vertu de l'al. c) du par. (1) de l'art. 8.

Sur quoi le Ministre se fonde-t-il alors pour prétendre qu'une dette de \$34,612.33 est due par l'appelante à Transworld pour le pavillon de bains? Cette somme représente le solde du coût total après déduction d'un crédit de \$15,000 autorisé comme valeur d'un certain nombre d'actions d'une autre compagnie, transférées par l'appelante à Transworld. Cependant, l'appelante, qui dans l'appel en matière d'impôt s'est vue cotisée comme bénéficiaire pour la valeur du pavillon de bains, s'est aussi dans la même instance vue cotisée pour un profit de \$12,750 sur le transfert de ces actions. Le bilan de Transworld au 31 janvier 1969 indique qu'un

¹⁴ [1967] 1 A.C. 853.

¹⁵ [1964] P. 181.

¹⁶ (1939), 62 C.L.R. 464.

¹⁴ [1967] 1 A.C. 853.

¹⁵ [1964] P. 181.

¹⁶ (1939), 62 C.L.R. 464.

represents a forced debit balance by the Vancouver District Taxation Office, by it escrowing cash on sale of [appellant's] house . . .". Notwithstanding Sheppard J.'s characterization of the value of the pool house on the tax appeal as a s. 8(1)(c) benefit, the Minister now says that he can still urge the \$34,612.33 to be a debt because (1) the appellant admitted it to be a debt on her examination for discovery in the tax appeal proceedings; and (2) it is still owing as between Transworld and the appellant; and (3), in any event the value of the pool house can be at the same time both a benefit and a debt or a loan.

Appellant's assertion on her examination for discovery that the cost of construction of the pool house was a debt owing by her to Transworld was part of her case against the Minister's reassessment which was based by him on s. 8(1)(c). Sheppard J. rejected this construction of the pool house transaction and affirmed the Minister's position. For the Minister now to insist on the existence and validity of the debt, as if the assertion on discovery was a disembodied proposition, is unacceptable reprobation and approbation. Nor is his position any better in alleging that there is an outstanding debt as between the appellant and Transworld and that he is entitled to act on that fact in the writ of extent proceedings despite the determination made by Sheppard J. in the tax appeal. I propose to deal with this contention in the light of the authorities and of principle in respect of issue estoppel.

The Minister's position in law is founded on *res judicata* in its traditional cause of action sense. In tax matters, this was a position which rejected *res judicata* as an answer to tax liability

montant de \$34,612.33 est dû par l'appelante, et il s'y trouve une note que [TRANSLATION] «[ceci] représente un solde débiteur forcé de la part du bureau de district de l'impôt de Vancouver, qui a entiercé le comptant provenant de la vente de la maison [de l'appelante] . . .». Malgré que M. le Juge Sheppard ait considéré que la valeur du pavillon de bains dans l'appel en matière d'impôt était un bénéfice selon l'al. c) du par. (1) de l'art. 8, le Ministre dit maintenant qu'il peut toujours prétendre que la somme de \$34,612.33 est une dette parce que (1) l'appelante a reconnu qu'il s'agissait d'une dette lors de son interrogatoire préalable dans l'appel en matière d'impôt; et (2) que la somme est toujours due pour ce qui concerne l'appelante et Transworld; et (3) que, de toute façon, la valeur du pavillon de bains peut être en même temps un bénéfice et une dette ou un emprunt.

L'assertion de l'appelante lors de son interrogatoire préalable, selon laquelle le coût de construction du pavillon de bains était une dette due par elle à Transworld, était un élément de la cause qu'elle soutenait contre la nouvelle cotisation du Ministre fondée sur l'al. c) du par. (1) de l'art. 8. M. le Juge Sheppard a rejeté cette interprétation de l'opération relative au pavillon et il a confirmé la position soutenue par le Ministre. Le fait, pour le Ministre, d'insister maintenant sur l'existence et la validité de la dette, comme si l'assertion faite lors de l'interrogatoire au préalable était une affirmation désincarnée, constitue une réprobation et une approbation inacceptables. Sa position n'est pas plus défendable lorsqu'il allègue qu'il existe une dette échue pour ce qui concerne l'appelante et Transworld et qu'il a le droit de se fonder sur ce fait-là pour obtenir délivrance du bref de saisie «extent» nonobstant la décision rendue par M. le Juge Sheppard dans l'appel interjeté en matière d'impôt. J'entends traiter de cette prétention à la lumière des précédents et des principes relatifs à l'issue estoppel.

La position du Ministre en droit est fondée sur la chose jugée dans son sens traditionnel d'identité de causes d'action. En matière fiscale, il s'agit d'une position qui a rejeté le moyen de

for a particular year although the taxpayer had successfully challenged liability on the same ground in a previous year: see *Caffoor v. Income Tax Commissioner*¹⁷. Long before this case, the High Court of Australia had recognized that there may be issue estoppel where *res judicata* in its cause of action or subject matter sense would not be open: see *Hoysted (or Hoystead) v. Commissioner of Taxation*¹⁸. Both the majority and dissenting opinions appreciated the distinction, and the reversal of the majority judgment by the Privy Council did not disavow it: see [1926] A.C. 155. Indeed, the Judicial Committee expressly approved the dissenting reasons of Higgins J. who had held that the tax commissioners were estopped by reason of a previous judgment of the High Court of Australia between the same parties relating to an earlier assessment, a judgment which, the Privy Council said (at p. 171) "was not merely incidental or collateral to the question [in issue, but] was fundamental to it". However, the Privy Council, at about the same time, but constituted differently as to the entire Board, took the *res judicata* subject matter approach in *Broken Hill Proprietary Co. Ltd. v. Broken Hill Municipal Council*¹⁹; and it was this case, and a later one in the House of Lords, *Society of Medical Officers of Health v. Hope*²⁰, that the Privy Council followed in *Caffoor*.

It acknowledged that the *Hoystead* case was not consistent with the authorities relied on in *Caffoor* and explained it as not having been argued on the principle of the *Broken Hill* case, namely, that the determination of an assessment for one year could not set up an estoppel upon an assessment for another year. Rather, said

chose jugée comme moyen de défense à l'encontre d'une cotisation fiscale pour une année particulière bien que le contribuable eût contesté la cotisation d'une année précédente avec succès en se fondant sur des raisons identiques: voir *Caffoor v. Income Tax Commissioner*¹⁷. Longtemps avant cet arrêt, la Haute Cour d'Australie avait reconnu qu'il peut y avoir *issue estoppel* lorsqu'il n'y a pas ouverture à la chose jugée dans son sens d'identité de causes d'action ou d'objets: voir *Hoysted (ou Hoystead) v. Commissioner of Taxation*¹⁸. Les opinions majoritaire et dissidente avaient toutes deux reconnu la distinction, et le Conseil privé, en infirmant le jugement de la majorité, ne l'a pas désavouée: voir [1926] A.C. 155. En effet, le Comité judiciaire a expressément approuvé les motifs dissidents du Juge Higgins qui avait décidé que les commissaires à la taxation étaient non recevables en raison d'un jugement antérieur de la Haute Cour d'Australie entre les mêmes parties relatif à une cotisation antérieure, un jugement qui, selon le Conseil privé (à la p. 171) [TRADUCTION] «n'était pas simplement incident ou annexe à la question en litige, mais lui était fondamental.» Cependant, le Conseil privé, vers la même époque, mais constitué différemment quant au Comité dans son ensemble, a adopté l'approche de la chose jugée dans son sens d'identité d'objets dans l'arrêt *Broken Hill Proprietary Co. Ltd. v. Broken Hill Municipal Council*¹⁹; et c'est cette décision, et une décision subséquente de la Chambre des Lords, *Society of Medical Officers of Health v. Hope*²⁰, que le Conseil privé a suivie dans l'arrêt *Caffoor*.

Il a reconnu que l'arrêt *Hoystead* n'était pas conforme aux précédents retenus dans *Caffoor* et il a donné comme explication qu'on n'avait pas plaidé l'affaire *Hoystead* sur le principe de l'arrêt *Broken Hill*, à savoir, que la décision rendue à l'égard d'une cotisation pour une année quelconque ne peut pas constituer une fin de

¹⁷ [1961] A.C. 584.

¹⁸ [1921], 29 C.L.R. 537.

¹⁹ [1926] A.C. 94.

²⁰ [1960] A.C. 551.

¹⁷ [1961] A.C. 584.

¹⁸ [1921], 29 C.L.R. 537.

¹⁹ [1926] A.C. 94.

²⁰ [1960] A.C. 551.

Lord Radcliffe, referring in *Caffoor* at p. 601, to the *Hoystead* case:

...the attention of the Board was wholly occupied with a discussion of what is quite a different issue in connection with estoppel, whether there can in law be estoppel *per rem judicatam* in respect of an issue of law which, though fundamental to the issue, has been conceded and not argued in an earlier proceeding.

Assuming, as is indicated in *Caffoor*, that the principles applied in the tax assessment cases "form a somewhat anomalous branch of the general law of estoppel *per rem judicatam* and are not easily derived from or transferred to other branches of litigation in which such estoppels have to be considered" (see [1961] A.C. at pp. 599-600), the present case does not involve successive tax assessments against the appellant and hence cannot rest on the indicated anomaly. Moreover, so far as English cases are concerned, it seems to me that what was said on issue estoppel in *Carl Zeiss Stiftung v. Rayner and Keeler Ltd. (No. 2)*²¹, makes it unlikely that any anomalous rule, such as that upon which *Caffoor* appeared to be based, retains any survival value. At any rate, I would reject the introduction of such an anomaly into the law of Canada.

I cannot fail to note that none of the Law Lords in the *Carl Zeiss* case examined either *Caffoor* or *Broken Hill*, and only Lord Reid mentioned *Hoystead* and then only on the question whether issue estoppel applies equally to a point of assumption or admission as to a point fully litigated. In the present case, there was full litigation, to finality, of the issue and characterization of the value of the pool house, and hence the doubtful point in issue estoppel arising from what was said in the *Hoystead* case does not arise here.

non-recevoir à l'encontre d'une cotisation pour une autre année. Plutôt, selon Lord Radcliffe, qui, à la p. 601 de l'arrêt *Caffoor*, se référait à l'affaire *Hoystead*:

[TRANSDUCTION] ... l'attention du Comité s'était portée entièrement sur l'examen de ce qui est une question bien différente relativement à la fin de non-recevoir (*estoppel*), celle de savoir si en droit il peut y avoir *estoppel per rem judicatam* quant à une question de droit qui, bien que fondamentale à la question en litige, a été concédée et non débattue dans une procédure antérieure.

Supposant, tel qu'indiqué dans *Caffoor*, que les principes appliqués aux affaires de cotisation d'impôt [TRANSDUCTION] «constituent un secteur quelque peu anormal du droit général relatif à l'*estoppel per rem judicatam*, et ne peuvent facilement tirer origine des autres secteurs du contentieux dans lesquels on doit tenir compte de semblables *estoppels*, ou y être transposés» (voir [1961] A.C. aux pp. 599-600), l'espèce présente ne met pas en cause des cotisations d'impôt successives contre l'appelante et par conséquent ne peut reposer sur l'anomalie dont il est question. De plus, dans la mesure où la jurisprudence anglaise est concernée, il me semble que ce qui a été dit sur l'*issue estoppel* dans l'arrêt *Carl Zeiss Stiftung v. Rayner and Keeler Ltd. (n° 2)*²¹, rend improbable qu'une règle anormale quelconque, comme celle sur laquelle l'arrêt *Caffoor* a semblé être fondé, puisse garder quelque valeur à l'avenir. De toute façon, je rejetterais l'introduction de semblable anomalie dans le droit canadien.

Je ne puis m'empêcher d'observer qu'aucun des membres juristes de la Chambre des lords dans l'affaire *Carl Zeiss* n'a pris en considération soit *Caffoor* soit *Broken Hill*, et que seul Lord Reid a mentionné *Hoystead* et là seulement sur le point de savoir si l'*issue estoppel* s'applique autant à un point postulé ou concédé qu'à un point qui a été débattu à fond. En l'espèce présente, il y avait eu débat complet, jusqu'à décision finale, sur la question en litige, et qualification de la valeur du pavillon de bains, et, par conséquent, le point douteux qui découle de ce qui a été dit dans l'arrêt *Hoystead* en matière d'*issue estoppel* ne surgit pas ici.

²¹ [1967] 1 A.C. 853.

²¹ [1967] 1 A.C. 853.

The basis of issue estoppel as well as a cause of action estoppel has been variously explained; for example, that it is "founded on considerations of justice and good sense" (see *New Brunswick Railway Co. v. British and French Trust Corp. Ltd.*²², at p. 19); that it is "founded upon the twin principles so frequently expressed in Latin that there should be an end to litigation and justice demands that the same party shall not be harassed twice for the same cause" (*Carl Zeiss* case, per Lord Upjohn at p. 946, per Lord Guest at p. 933); that it is founded on "the general interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions; and . . . the right of the individual to be protected from vexatious multiplication of suits and prosecutions . . ." (Spencer-Bower and Turner, *Res Judicata*, (2nd ed. 1969), p. 10). Although, as Lord Reid said in the *Carl Zeiss* case, at p. 913, "issue estoppel may be a comparatively new phrase" (and is also known, especially in American decisions and writings, as collateral estoppel or issue preclusion), as a principle it goes back almost two hundred years in English case law to the *Duchess of Kingston's Case*²³. It has been recognized as well in Canadian case law as the following statement by Middleton J.A. in *McIntosh v. Parent*²⁴, at p. 555, attests:

When a question is litigated the judgment of the Court is a final determination between the parties and their privies. Any right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or as an answer to a claim set up cannot be retried in a subsequent suit between the same parties or their privies though for a different cause of action. The

²² [1939] A.C. 1.

²³ (1776), 20 St. Tr. 355.

²⁴ (1924), 55 O.L.R. 552.

Le fondement de l'*issue estoppel* aussi bien que du *cause of action estoppel* a reçu diverses explications; par exemple, qu'il est [TRADUCTION] «fondé sur des considérations de justice et de bon sens» (voir *New Brunswick Railway Co. v. British and French Trust Corp. Ltd.*²², à la p. 19); qu'il est [TRADUCTION] «fondé sur les principes jumeaux si fréquemment exprimés en latin selon lesquels tout litige doit avoir une fin et la justice exige que la même partie ne soit pas harassée deux fois pour la même cause» (affaire *Carl Zeiss*, d'après Lord Upjohn, p. 946, d'après Lord Guest, p. 933); qu'il est fondé sur [TRADUCTION] «l'intérêt général de la collectivité à ce que les différends prennent fin, et à ce que les décisions judiciaires aient un caractère final et concluant, et . . . sur le droit de l'individu à être protégé d'une multiplicité vexatoire de demandes et de poursuites . . .» (Spencer-Bower et Turner, *Res Judicata*, (2^{ème} éd. 1969), p. 10). Bien que, comme le disait Lord Reid dans l'arrêt *Carl Zeiss*, à la p. 913, [TRADUCTION] «*issue estoppel* puisse être une expression relativement nouvelle» (et soit aussi connue, en particulier dans les décisions et auteurs américains, sous le nom de *collateral estoppel*» (fin de non-recevoir annexe) ou encore de «*issue preclusion*» (empêchement à question)), en tant que principe l'*issue estoppel* remonte à presque deux cents ans en arrière dans le droit jurisprudentiel anglais, jusqu'à l'arrêt *Duchess of Kingston's*²³. Il a été également reconnu dans le droit jurisprudentiel canadien, comme le démontre l'énoncé suivant du Juge d'appel Middleton dans l'arrêt *McIntosh v. Parent*²⁴, à la p. 555:

[TRADUCTION] Lorsqu'une question est soumise à un tribunal le jugement de la cour devient une décision finale entre les parties et leurs ayants droit. Les droits, questions ou faits distinctement mis en cause et directement réglés par un tribunal compétent comme motifs de recouvrement ou comme réponses à une prétention qu'on met de l'avant, ne peuvent être jugés de nouveau dans une poursuite subséquente

²² [1939] A.C. 1.

²³ (1776), 20 St. Tr. 355.

²⁴ (1924), 55 O.L.R. 552.

right, question or fact once determined must as between them be taken to be conclusively established so long as the judgment remains. . .

Issue estoppel has been recognized in this country and in this Court in criminal cases (see, for example, *Wright, McDermott and Feeley v. The Queen*²⁵, and it is no less applicable in civil matters. Nor is the application of that principle in any way affected because it is directed against a Minister of the Crown: see *Fonseca v. Attorney General of Canada*²⁶, at p. 619. I see no reason to introduce any anomalies or exceptions to its general application if the facts call for it. The remaining question here then is whether the facts as between the appellant and the Minister bring issue estoppel into play.

The Minister's contention that the pool house transaction can be both a benefit and a loan or debt at the same time ignores the basis upon which he sought and succeeded in his reassessment of the appellant. There are two related points here which call for comment. First, the Minister founded his claim against the appellant upon s. 8(1)(c) and not upon s. 8(1)(a) or (b) or s. 8(2). Any question of a loan, arising from the arrangements for a bank credit to Transworld which was ultimately repaid by a Transworld cheque (leaving Transworld and the appellant where they were before), was negated by Sheppard J. as having been dependent upon a lease which was ineffective to support it. A device which failed as a defence to a reassessment, and so determined by a final judicial decision, cannot, in my view, be later reactivated as between the same parties to provide a different basis upon which to attempt to capture the same sum twice. There were, arguably, "funds or property" within s. 8(1)(b) or "a benefit or advantage" within s. 8(1)(c) conferred upon the appellant by Transworld, and the Minister chose to make his case under s. 8(1)(c). The logic of his present position would equally warrant him

entre les mêmes parties ou leurs ayants droit, même si la cause d'action est différente. Le droit, la question ou le fait, une fois qu'on a statué à son égard, doit être considéré entre les parties comme établi de façon concluante aussi longtemps que le jugement demeure . . .

L'issue estoppel a été reconnu en ce pays et en cette Cour dans les affaires criminelles (voir, par exemple, *Wright, McDermott et Feely c. La Reine*²⁵), et ne s'applique pas moins en matière civile. L'application de ce principe n'est pas non plus atteinte parce qu'il est invoqué à l'encontre d'un ministre de la Couronne: voir *Fonseca c. Procureur général du Canada*²⁶, à la p. 619. Je ne vois aucune raison d'introduire des anomalies ou des exceptions à son application générale si les faits permettent de l'invoquer. Ici, la question qui reste à décider est de savoir si les faits tels qu'ils existent entre l'appelante et le Ministre font entrer en jeu l'issue estoppel.

La prétention du Ministre que la transaction relative au pavillon de bains peut être à la fois un bénéfice et un emprunt ou une dette en même temps ne tient pas compte du fondement sur lequel il a voulu et obtenu la nouvelle cotisation qu'il recherchait à l'égard de l'appelante. Il y a ici deux points reliés qui appellent des commentaires. D'abord, le Ministre a fondé sa réclamation contre l'appelante sur l'al. c) du par. (1) de l'art. 8 et non pas sur les al. a) ou b) du par. (1) ou sur le par. (2), même article. Toute évocation d'un prêt, résultant des dispositions prises pour que la banque émette en faveur de Transworld un crédit qui en définitive a été remboursé par un chèque de Transworld (laisant Transworld et l'appelante dans la situation où elles étaient auparavant), a été repoussée par M. le Juge Sheppard comme subordonnée à un bail qui ne pouvait efficacement lui servir de fondement. Un expédient qui a failli comme moyen de défense à l'encontre d'une nouvelle cotisation, et qui est donc réglé par une décision judiciaire finale, ne peut, à mon avis, être par la suite réactivé entre les mêmes parties de façon à fournir une base différente sur laquelle tenter de capturer la même somme une seconde fois. On

²⁵ [1963] S.C.R. 539.

²⁶ (1889), 17 S.C.R. 612.

²⁵ [1963] R.C.S. 539.

²⁶ (1889), 17 R.C.S. 612.

in claiming that a debt exists under s. 8(1)(b) which could be the subject of a writ of extent. If the Minister had succeeded in making his case in the tax appeal under s. 8(2), it would have been on the basis that there had been a loan which did not come within any of the exceptions to taxability. That, however, was not how the Minister chose to characterize the value of the pool house, and, clearly, on the facts there was no basis for contending that there had been a loan, giving rise in that aspect to a debt.

Even on the assumption that as between Transworld and the appellant a debt had arisen at the time, I do not think that the Minister can urge this against the appellant in the present case. There are two affidavits in the record of this case, by a chartered accountant and by a solicitor respectively, which state and explain why the sum of \$34,612.33 was written off as an indebtedness as of January 31, 1970. It is immaterial whether these affidavits, upon which there was no cross-examination, be taken at face value. At worst, they underline the position taken by the Minister against the appellant in the tax appeal. Where issue estoppel is concerned I do not think that there is any warrant for invoking a *jus tertii*. Moreover, to do so in the present case would be to rely, in another form, on the same rejected view of the transaction that the Minister has asserted with respect to the appellant's admission on her examination for discovery in the tax appeal. The matter in issue is one between parties or their privies, and here this means only the Minister and the appellant.

pouvait alléguer qu'il y avait eu attribution à l'appelante par Transworld de «fonds ou biens» selon l'al. b) du par. (1) de l'art. 8 ou d'«un bénéfice ou d'un avantage» selon l'al. c) du par. (1) de l'art. 8, et le Ministre a choisi de procéder en vertu de l'al. c). La logique de sa position actuelle l'autoriserait également à prétendre qu'il existe en vertu de l'al. b) du par. (1) de l'art. 8 une dette qui pourrait faire l'objet d'un bref de saisie «extent». Si le Ministre avait eu gain de cause en procédant en vertu du par. (2) de l'art. 8 dans l'appel en matière d'impôt, cela aurait été sur la base de l'existence d'un prêt qui n'était visé par aucune des exceptions à l'imposition. Cela, cependant, n'est pas la façon dont le Ministre a choisi de qualifier la valeur du pavillon de bains, et, de toute évidence, d'après les faits, il n'y avait pas de fondement sur lequel prétendre qu'il y avait eu un prêt, donnant lieu sous cet aspect à une dette.

Même dans l'hypothèse que, pour ce qui concernait Transworld et l'appelante, une dette soit intervenue à l'époque, je ne pense pas que le Ministre puisse invoquer cela contre l'appelante en l'espèce présente. Il y a au dossier de la présente affaire deux déclarations sous serment, souscrites l'une par un comptable agréé et l'autre par un avocat, qui déclarent et expliquent pourquoi la somme de \$35,612.33 a été radiée comme créance à compter du 31 janvier 1970. Il est sans conséquence de se demander si ces déclarations sous serment, qui n'ont fait l'objet d'aucun contre-interrogatoire, doivent être acceptées telles quelles. Au pire, elles soulignent la position qu'a prise le Ministre contre l'appelante dans l'appel interjeté en matière d'impôt. Lorsque l'*issue estoppel* est en cause, je ne crois pas que l'on puisse invoquer le droit d'un tiers. De plus, le faire en l'espèce équivaldrait à s'appuyer, sous une autre forme, sur la même conception rejetée de l'opération que le Ministre a mise de l'avant relativement à l'aveu fait par l'appelante lors de l'interrogatoire préalable qu'elle a subi dans l'appel interjeté en matière d'impôt. La question en litige est une question qui concerne les parties ou leurs ayants droit, ce qui veut dire ici le Ministre et l'appelante seulement.

I would, accordingly, allow the appeal and vary the order of Sheppard J. by directing that the writ of extent in the third degree against the appellant be set aside. She is entitled to her costs in this Court and also in the Exchequer Court in respect of the writ of extent against her.

Appeal dismissed with costs, SPENCE and LASKIN JJ. dissenting.

Solicitor for the appellant: C. C. Sturrock, Vancouver.

Solicitor for the respondent: N. D. Mullins, Vancouver.

Par conséquent, j'accueillerais l'appel et modifierais l'ordonnance de M. le Juge Sheppard en ordonnant que le bref de saisie «extent» au troisième degré contre l'appelante soit annulé. L'appelante a droit à ses dépens en cette Cour et aussi en Cour de l'Échiquier à l'égard du bref de saisie «extent» émis contre elle.

Appel rejeté avec dépens, les Juges SPENCE et LASKIN étant dissidents.

Procureur de l'appelante: C. C. Sturrock, Vancouver.

Procureur de l'intimé: N. D. Mullins, Vancouver.

Joanne St. Lewis (Plaintiff) – and – Denis Rancourt (Defendant)

Court File No.: 11-51657

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT OTTAWA

DEFENDANT'S BOOK OF AUTHORITIES
VOIR DIRE ON "PROXY DEFENCE"
(For trial starting May 12, 2014)

Dr. Denis Rancourt

(no fax)

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Defendant